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A

TREATISE

ON THE

PRACTICE

OF THE

HIGH COURT OF CHANCERY,

WITH SOME

PRACTICAL OBSERVATIONS

ON THE

PLEADINGS IN THAT COURT.

By EDMUND ROBERT DANIELL, F. R. S.
BARRISTER AT LAW.

VOLUME I.

FROM THE LONDON EDITION.

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TO THE RIGHT HONOURABLE

CHARLES CHRISTOPHER BARON COTTENHAM,

OF COTTENHAM IN THE COUNTY OF CAMBRIDGE,

LORD HIGH CHANCELLOR OF GREAT BRITAIN,

THE FOLLOWING TREATISE

IS

(WITH HIS LORDSHIP'S PERMISSION)

MOST RESPECTFULLY DEDICATED,

BY

THE AUTHOR.

ADVERTISEMENT.

The Author trusts, that when the time necessary to pass through the press a Volume requiring so much accuracy, and containing so many references, and the number of cases which are daily occurring upon the subject of Practice are considered, the Profession will appreciate his motive for publishing the following Treatise in separate portions. As little delay as possible will occur in bringing out the remainder of the Work; and in the meantime, it is hoped that the copious Index which is added to the present Volume will in some measure prevent the inconvenience which might otherwise be experienced from the delay.

PREFACE.

WHATEVER apology may be due to the Profession for the manner in which the work has been executed, the Author does not conceive that he is called upon to offer any for the publication of a new Treatise on the Practice of the Court of Chancery. The want of such a Treatise, on a more extended scale than those hitherto published, has long been acknowledged; and the writer feels, that in undertaking one, he is only complying with the wishes of the Profession. Whether the ensuing pages will supply the want which has been felt, is not for him to say; indeed, when he compares what he has accomplished with the previous notions which he had formed in his own mind as to the requisites of a good book of practice, it is with unfeigned diffidence that he commits his work to the Public. He trusts, however, that if he has not performed all that he aimed at, his endeavours to throw light upon this complicated subject will not have proved entirely ineffectual.

The object which the Author has had in view has been to lay before the reader, not merely the abstract rules of practice, collected from the text-books and marginal notes of reports, but to show, as far as could be done, the principles upon which the various rules have been framed, and to point out how far those principles have been followed up in the decisions to be found in the reported cases. He has also endeavoured to bring under the eye of the practitioner the several alterations and modifications which have been made, in the course of proceeding, by the numerous Statutes and Orders of Court which have, of late years, been framed, and to show how far those alterations and modifications are consistent with the ancient practice and the principles by which it was governed. In doing this, he has drawn largely from the excellent work of Lord Chief Baron Gilbert, and from the older text-books and the modern editions of them, as well as from several of the more recent publications. In referring to text-books for information, he has been careful to avoid citing them in any case where the authorities upon which they proceeded were accessible, without a careful inspection and collation of such authorities; and he can venture to assure the Profession that there are few, if any, of the numerous cases cited and referred to in the following Treatise which have not been carefully examined by himself; and that he has also, in every instance in which there has appeared any doubt as to the correctness of the report, made it a rule to refer to the statement of the case in the Registrar's book. In discussing the modern alterations which have taken place under the new Orders and Statutes, he has not always had the advantage of reported cases for his guidance, he has, however, derived considerable assistance from the Report of the Commissioners, appointed in the year 1824, to inquire into the Practice of the High Court of Chancery, and of the explanatory paper annexed to that document. He has also derived much useful information from the notes and explanations in Mr. Jemmett's edition of Sir Edward Sugden's Acts. The same sources, however, have not supplied information as to all the recent Sta-

tutes and Orders; and in such cases he has had no alternative but to state the alteration which has taken place without comment, or to offer the result of his own reasoning and conjectures upon them.

With regard to the "Practical Observations on the Pleadings in the Court," which are incorporated in the following Treatise, the Author owes it to some of his friends, for whose judgment he has the highest respect, to say, that it is contrary to their opinions that he has ventured to introduce them. It must, however, be admitted, that it is extremely difficult in a work of this nature to separate pleading from practice: many points in each are so intimately connected with or arise out of the other, that it is scarcely possible to shew the precise line of demarcation; besides which, the writer has himself, in the course of practice, so frequently felt the want of some book which should give him information as to many of the practical points connected with pleading, which every Chancery pleader is supposed to have learnt in the Draftman's office where he has acquired his rudiments, and which for that reason are never mentioned in any of the books of practice or publications upon pleading, that he cannot but expect that the incorporation in the following Treatise of such observations upon those points as his own limited experience and the communications of his friends have enabled him to collect, will be as acceptable to the Profession in general, and to the junior branches of it in particular, as it would have been to himself. The same expectation has induced him to make an attempt to reduce into some order the various points and decisions which occur upon the intricate subject of "Parties."

The general plan adopted in the following pages has been (after pointing out the persons by and against whom a suit in Chancery may or may not be instituted, with the peculiarities in point of practice attached to each description of party litigant, and showing who the parties are that must necessarily be brought before the Court in each case,) to trace a suit in equity from its commencement to its termination, detailing all the practical points, whether relating to pleading or to practice, which may arise in every stage of the proceeding. In doing this he has endeavoured to discuss fully every point as it occurs, so that each chapter, and each section of every chapter, may set before the reader the whole law upon the subject of which it treats. By this means he has avoided the necessity of making, perpetually, "prospective references," which frequently occasion confusion, and are always inconvenient to the reader. The course thus pursued may sometimes have led to repetitions; but it is hoped that the instances in which it has done so will not be found very numerous.

There only remains to the writer the agreeable task of returning his sincere thanks to his professional friends for the assistance which he has received from them in the course of his work. He has also to express his gratitude to the Officers of the Court, to whom he has had occasion to apply for information upon points arising within their respective departments, for the readiness with which such information has been communicated. In the Registrar's-office, particularly, he has met with attentions, which he is most happy to acknowledge; and he feels that he is adding much to the value of his work when he states that he is indebted to the kindness of Mr. Colville for much useful and valuable information.

LINCOLN'S-INN,
March 6, 1837.

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2 Geo. 2,	i. 584
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3 Geo. 2, c. 30,	ii. 616, 681
4 Geo. 2, c. 26,	i. 1
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9 Geo. 2, c. 36,	ii. 174
12 Geo. 2, c. 12,	i. 584
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36 Geo. 3, c. 52, i. 112
37 Geo. 3, c. 142, ii. 522, 699, 701, 705, 894, 897
39 & 40 Geo. 3, c. 88, i. 20
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45 Geo. 3, c. 124, i. 668, 686, 687, 699
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46 Geo. 3, c. 37, ii. 556
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50 Geo. 3, c. 8, ii. 485
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CHAPTER I.

OF THE COMMENCEMENT OF A SUIT.

A SUIT in the Equity side of the Court of Chancery is commenced by preferring a petition, containing a statement of the plaintiff's case, and praying the relief which he considers himself entitled to receive. This petition, when preferred by a subject, is called in the old books an *English Bill*, by way of distinction from the proceedings in suits within the ordinary or common-law jurisdiction of the Court, which till the statute of 4 Geo. 2, c. 26, were entered and enrolled more anciently in the French or Norman tongue, and afterwards in Latin, and is usually addressed to the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal, (*a*) unless the seals are in the King's hands, or the Chancellor himself be the suitor, in which case the bill is addressed to the King himself. (*b*)

If the suit is instituted on behalf of the Crown, or of those who partake of its prerogative, or whose rights are under its particular protection, such as the objects of a public charity, the matter of complaint is offered to the Court, not by way of petition, but of information, (*c*) by the proper officer, of the rights which the Crown claims on behalf of itself or others, and of the invasion or detention of those rights for which the suit is instituted. (*d*) This proceeding is then styled an information. The rules of practice incidental to these two methods of instituting a suit in Equity differ so little from each other, that in the ensuing Treatise what is said with respect to the one may be considered as applicable to both, unless where a distinction is specifically pointed out.

*There are other methods of commencing proceedings in the Court of Chancery, namely, by petitions, in cases of infancy, or [*2] under particular Acts of Parliament, the practice with regard to which, as well as with regard to petitions addressed to the Lord Chancellor in his character of *custodies* of idiots and lunatics, will be the subject of future chapters; but for the present I shall confine my observations to the practice arising out of the ordinary proceedings by bill or information; and in doing this I shall endeavour, first, to trace a suit in all its regular stages, from the bill to the final decree; I shall then proceed to the consideration of the points of practice which arise from incidental occurrences, and from interlocutory applications. As a preliminary step, however, I shall first point out the persons by and against whom a suit may be instituted, with the peculiarities of practice applicable to each description of persons; and shall then direct the practitioner's attention to the parties whom it may be necessary for him to bring before the Court, in order to entitle the plaintiff to obtain the decree which he seeks.

(*a*) Ld. Red. 7.
(*b*) Ld. Red. 7.
(*c*) Ld. Red. 7.
(*d*) Ld. Red. 18; 2 West. Symb. 194.

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*CHAPTER II.

OF THE PERSONS BY WHOM A SUIT MAY BE INSTITUTED.

SECT. I.—*The King's Attorney General.*

IT is a general rule, subject to very few exceptions, that there is no sort or condition of persons but may sue in the Court of Chancery, and this extends from the highest person in the State to the most distressed pauper.

The King himself has the same right which a subject has, to institute proceedings in his own Courts for the assertion of any right which he claims, either on behalf of himself or others, and the same principles which entitle a subject to the assistance of a court of equity, to enable him to assert his legal rights, are equally applicable to the Sovereign. Thus a suit may be instituted on behalf of the Crown to have the benefit of a discovery from persons charged to be aliens of the place of their birth, in order to assist him in a commission to inquire into their lands, with the view of seizing them into his hands by inquisition. (*a*) For the same reason, where an office cannot be found for the Crown without the aid of a Court of Equity, the Court will, at the suit of the Crown, interfere to restrain the commission of waste in the mean time. (*b*)

It is said that the King is not bound to assert his rights in any particular Court, but that he may sue in any of his Courts which he pleases, without reference to the question whether the subject matter of his suit is such as comes within the peculiar jurisdiction of such Court. (*c*) Thus he may have a *quare impedit* in the King's Bench, (*d*) or he may elect to sue either in a Court of Common Law or in a Court of Equity. In a suit which was commenced in Chancery by the Attorney General on behalf of the King and Lord Hunsdon, [*4] as the King's *farmer for the manor of West Thoresley and Castleby, in the county of York, against the Duchess Dowager of Arundel and others, a decree was pronounced for the King, although the King had a good title at law, as appears by the report of Sir H. Hobart, who as Lord Chief Baron assisted the Lord Chancellor; (*e*) and in *Attorney General* v. *Vernon*, (*f*) a patent of lands was set aside as unduly obtained, by information in equity. In both these cases, however, there were equitable grounds alleged for instituting the proceedings. In the former case, the cause alleged was, that the deeds whereby the estate came to the party under whose attainder the Crown claimed, were suppressed or withheld by the defendants; in the latter case, fraud and surprise were charged as grounds of relief. There seems, however, to be no doubt but that the King may proceed in questions relating to the property to which he is entitled in right of his Crown, either in a Court of Law or in a Court of Equity, and that where he has caused a Court of Equity to be informed that an intrusion has been committed on his land, although no matter of equitable jurisdiction has been stated, yet the information will be entertained: but in such cases, if any question of law arises, the Court will put it in the course of trial by a Court of Law, and will retain the information

(*a*) Attorney General v. Du Plessis, 1 Bro. P. C. 415–19.
(*b*) 2 Ves. 286.
(*c*) 11 Rep. 68 B.; Ibid. 75 A.; Plowden, 236, 240, 244.
(*d*) 11 Rep. 68 B.
(*e*) The King v. The Countess Dowager of Arundel, Hob. 131.
(*f*) 1 Vern. 277, 370; 2 Ch. R. 353, S. C.

till the result of such trial is known. (g) In general, however, suits on behalf of the Crown are instituted in the Court which, by its constitution, is most properly adapted to the case; and the Court of Exchequer being the general Court for all business relating to the King's revenue or property, the practice is, that all proceedings relating to the property of the Crown, whether at common law or in equity, should be instituted there. Many cases, however, occur in the books in which proceedings relating to the rights of the Crown have been commenced in the Court of Chancery; but they are, in general, confined to cases of *purpresture or nuisance*, or other matters where the proceedings have been commenced at the relation of individuals, who, as they are considered responsible for the costs *and conduct of the suit, are in general at liberty to commence it in whatever Court of competent [*5] jurisdiction they please. For the same reason, informations on behalf of charities, or of idiots or lunatics, in which there is generally a relator, are frequently exhibited in the Court of Chancery, although they may, with equal propriety, be commenced in the Exchequer. And it is to be observed, that in cases relating to charities, informations under the Act of 59 Geo. 3, c. 51, may be commenced either in the Court of Chancery or Exchequer, although in general they have been instituted in the former Court.

In all cases where the right of the King, or of those who partake of his prerogative, are the subject of the suit, the name of the King is not, as we have seen, made use of as the party complaining, but the matter of complaint is offered to the Court by way of information given by the proper officer. That officer, if the information is exhibited in any of the Supreme Courts at Westminster, is the Attorney General, or if the office of Attorney General should happen to be vacant, the Solicitor General. (h)

Besides the Attorney and Solicitor General, who are the officers for conducting the King's business in his Courts at Westminster, the King has officers of the same description in the county palatine of Lancaster and in the duchy of Lancaster, whose duty it is to conduct the business of the Crown in the courts belonging to those jurisdictions. (i) The Bishop of Durham, as possessing *jura regalia* in the county palatine of Durham, has also his Attorney General for the same purpose within his jurisdiction. And it seems that the Bishop of Ely has also the privilege of appointing an Attorney General within his franchise.

*Previously to the passing of the Act of the 11 Geo. 4, & 1 Will. 4, c. 70, by which the jurisdictions of the Courts of Great [*6] Session in the principality of Wales and county palatine of Chester, and of the Chamberlain and Vice Chamberlain of Chester, were transferred to the Courts at Westminster, informations on behalf of the Crown to these Courts respecting matters within their jurisdiction must have been by the Attorneys General of those jurisdictions. But since the passing of that Act, although by the 34th sect. the offices of Attorney General of Chester and of Wales are continued to

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(g) *Vide* Attorney General to the Prince of Wales v. Sir J. St. Aubyn, Wightw. 167, and the cases there cited; *vide etiam* Attorney General v. The Mayor of Plymouth, ibid. 134.

(h) Ld. Red 18; Wilkes's Case, 4 Bur. 2527.

(i) The Court of the Duchy Chamber of Lancaster has both a legal and equitable jurisdiction with regard to lands within its survey, and proceedings relating to the property of the Crown within its jurisdiction are generally commenced by information by the Attorney General of the jurisdiction. Per Wood, B.; Attorney General for the Prince of Wales v. St. Aubyn, Wightw. 217. It seems, however, that the Court of Exchequer and Court of Chancery have a concurrent jurisdiction within the Duchy Court of Lancaster. Levington v. Woton, 1 Ch. Rep. 52; Toth. 135; Hardr. 171.

the present holder of them till His Majesty's pleasure shall be otherwise declared, yet, as their offices are circumscribed by the jurisdictions to which they are appointed, and the courts of equity within those jurisdictions are removed, no informations in equity can be exhibited by them, because no person who sustains the character of Attorney General in a county palatine or other jurisdiction of this description is recognized as such in Westminster Hall. (*k*) In this respect, however, the Attorney General for the Duke of Cornwall appears to be in a different situation from Attorneys General of counties palatine, since it has been decided, in the case of the *Attorney General for the Prince of Wales* v. *Sir John St. Aubyn*, that he may exhibit an English information on behalf of the Prince of Wales, as Duke of Cornwall, in the King's Courts at Westminster. It seems, however, that this rule holds only during such time as there is a Duke of Cornwall in existence, and that when the duchy of Cornwall is in the hands of the Crown, the King's Attorney General conducts all proceedings relating to the duchy. When there is a Duke of Cornwall who has not attained his majority, such proceedings are also carried on by the King's Attorney General, taking along with him the Attorney General for the duchy of Cornwall, not, as it seems, that he is joined as a necessary party, but rather from attention to the Duke of Cornwall in respect of his interests. (*l*) When the Duke of Cornwall comes of age, the proceedings may, [*7] it would appear, be taken up and prosecuted by his Attorney *General alone. (*m*) And if the Duke of Cornwall should die *pendente lite*, the proceedings may be carried on by the King's Attorney General by information of revivor and supplement. (*n*)

Besides the cases in which the immediate rights of the Crown are concerned, the King's officers may, in some cases, institute proceedings on behalf of those who claim under the Crown, by grant or otherwise, or, more correctly speaking, those who claim under the Crown may make use of the King's name, or of that of his proper officer, for the purpose of asserting their right against a third party. Thus a *chose in action* may be assigned to the King, and may also be granted or assigned by him to another person; and in this latter case the grantee may either sue for it in his own name or in that of the King. (*o*) But if he sues in his own name he must make the Attorney General a party to his suit. In *Balch* v. *Wastall*, (*p*) A. having outlawed B., brought a bill against C., a trustee for B., with respect to an annuity, to subject this annuity to the plaintiff's debt, and the Court held, that forasmuch as by the outlawry all the defendant's interest, as well equitable as legal, was vested in the Crown, the plaintiff must not only get a grant thereof from the Crown, but must make the Attorney General a party to the suit. (*q*)

Informations may also be exhibited by the King's Attorney General or other proper officer in support of the rights of those whose protection devolves upon the Crown as supreme head of the Church. Thus the King, as supreme head of the Church, is the proper guardian of the temporalities of the bishopricks; and an information may therefore be brought by the Attorney General to stay waste committed by a bishop. (*r*)

(*k*) Arg° Attorney General to the Prince of Wales v. Sir J. St. Aubyn, Wightw. 178.

(*l*) Vide Wightw. 255, 256, and the proceedings there cited.

(*m*) Vide Wightw. 246, and the proceedings there cited.

(*n*) Ibid. 25.

(*o*) Dyer, 1, Pl. 7, 8; Keilw. 1, 69; 5 Bac. Ab. tit. Prerog. F. 3; Miles v. Williams, 1 P. Wms. 252; Earl of Stafford v. Buckley, 2 Ves. 181.

(*p*) 1 P. Wms. 445.

(*q*) *Vide etiam* Hayward v. Fry, ibid. 446; and Rex v. Fowler, Bunb. 38.

(*r*) Knight v. Mosely, Amb. 176; Wither v. D. & C. of Winchester, 3 Mer. 427; Jefferson v. Bishop of Durham, 1 Bos. & Pull. 129, 131.

In like manner the Attorney General may exhibit informations on behalf of individuals who are considered to be under the protection of the Crown as *parens patriæ* such as the objects of general charities, idiots and lunatics. In some instances, also, *the Attorney or Solicitor General is authorized to institute informations by particular Acts of Parliament, as [*8] in the case of proceedings under the Marriage Act, 4 Geo. 4, c. 76, and under the Acts (s) for giving additional facilities in applications to courts of equity regarding the management of estates or funds belonging to charities.

With respect to idiots and lunatics, it is to be observed that suits on their behalf are usually instituted by the committees of their estates; but that sometimes where there has been no committee, or where the interest of the committee is likely to clash with those of the persons whose estates are under their care, informations have been exhibited on their behalf by the Attorney General, as the officer of the Crown. (t) Where informations have been filed on behalf of persons found lunatic, but who have had no committee appointed, the Court will proceed to give directions for the care of the property of the lunatic, and for proper proceedings to obtain the appointment of a committee. (u) Persons incapable of acting for themselves, though not coming under the description of idiots or lunatics, have been permitted to sue by their next friend without the intervention of the Attorney General. (x)

It seems that when an information is filed on behalf of a lunatic, he must be named as a party to the suit, and that merely naming him as a relator will not be sufficient; (y) but in the cases of the *Attorney General* v. *Parkhurst*, (z) and *Attorney General* v. *Woolrich*, (a) a distinction appears to be taken between cases where the object of the suit is to avoid some transaction of the lunatic, on the ground of his incapacity, and those in which it is merely to affirm a contract entered into by him for his benefit, or to assert some claim on his behalf. In the former case it was held that the lunatic ought not to be named as plaintiff, because no man can be heard to stultify himself. If he is named, however, it will *be no ground for demurrer. (b) The [*9] reason for making a lunatic a party in proceedings of this nature appears to be, that as no person can be bound by a decree in a suit to which he or they under whom he derives title are not parties, and as a lunatic may recover his understanding, the decree will not have the effect of binding him unless he is a party to the suit; and upon the same principle it is held, that where a suit is instituted on behalf of the lunatic by his committee, the committee must be named as a co-plaintiff, in order that the right which the committee acquires in the lunatic's estate, by virtue of the grant from the Crown, may be barred. The same reason does not apply to cases of idiots, because in contemplation of law they never can acquire their senses; they are, therefore, not considered necessary parties to proceedings on their behalf. (c)

With respect to informations exhibited under particular Acts of Parliament: By the 59 Geo. 3, c. 91, which was passed for giving additional facilities in applications to Courts of Equity regarding the management of estates or funds belonging to charities, the commissioners appointed under the 58 Geo. 3, c 91,

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(s) 59 Geo. 3, c. 91; and 2 Will. 4, c. 57.

(t) Attorney General v. Parkhurst, 1 Cha. Ca. 112; Attorney General v. Woolrich, ibid. 153; Attorney General v. Tiler, 1 Dick. 378; 2 Eden, 230.

(u) Attorney General v. Howe, Ld. Red. 23, n. 3.

(x) Liney v. Wetherley, Ld. Red. 23, n. a.

(y) Attorney General v. Tiler, 1 Dick. 378.

(z) 1 Cha. Ca. 112. (a) Ibid. 153.

(b) Ridler v. Ridler, Eq. Ca. Ab. 279.

(c) Attorney General v. Woolrich, 1 Cha. Ca. 153.

and 59 Geo. 3, c. 81, or any five or more of them, are authorized and empowered, whenever, upon any investigation had or taken by or before them, any case shall arise or happen in which it shall appear to the said commissioners that the directions or orders of a Court of Equity are requisite for remedying any neglect, breach of trust, fraud, abuse or misconduct, in the management of any trust created for any charitable purposes, as therein mentioned, or of the estates or funds thereunto belonging, or for the regulating the administration of any such trust, or of the estates or funds thereof, to certify the particulars of such case in writing under their hands to His Majesty's Attorney general; and thereupon His Majesty's Attorney general is authorized and empowered, if he shall so think fit, either by a summary application in the nature of a petition, or by information, as the case may require, to apply to or commence a suit in [*10] His Majesty's High Court of Chancery, or to or in His Majesty's *Court of Exchequer, sitting as a Court of Equity, stating and setting forth the neglect, breach of trust, fraud, abuse or misconduct, or other cause of complaint or application, and praying such relief as the nature of the case may require. This Act has been continued by the 2 Will. 4, c. 57, sec. 11, by which Act the Attorney general's certificate that the particulars of the case in question have been duly certified to him by the commissioners, is made sufficient evidence of such certifying by the commissioners. (*e*) It is to be observed, that in proceedings under these Acts the Attorney general is not considered liable to costs in the event of failure; but although as an officer suing in discharge of his public duty he can never be made to pay costs in a Court of Equity, yet it is not the rule of a Court of Equity that he cannot receive costs, and that in an information under the first-mentioned Act the defendant was ordered to pay the Attorney general his costs. (*f*)

By the Marriage Act, 4 Geo. 4, c. 76, s. 23, it is enacted, that if any valid marriage solemnized by licence shall be procured by a party to such marriage to be solemnized between persons one or both of whom shall be under the age of twenty-one years, not being a widower or widow, contrary to the provisions of the Act, by means of such party falsely swearing as to any matter to which such party is required personally to swear, (such party wilfully and knowingly so swearing;) or if any valid marriage by banns shall be procured by a party thereto to be solemnized by banns between persons, one or both of whom shall be under the age of twenty-one years, not being a widower or widow, such party knowing that such person as aforesaid under the age of twenty-one years had a parent or guardian then living, and that such marriage was had without the consent of such parent or guardian, and knowing that banns had not been published according to the provisions of the Act, and having caused or procured the undue publication of banns; then and in every such case it shall be lawful [*11] for *his Majesty's Attorney general (or for his Majesty's Solicitor general in case of the vacancy of the office of Attorney general,) by information in the nature of an English bill, in the Court of Chancery or Court of Exchequer, at the relation of a parent or guardian of the minor whose consent has not been given to such marriage, and who shall be responsible for any costs incurred in such suit, (such parent or guardian previously making oath as is thereinafter required,) to sue for a forfeiture of all estate, right, title and interest in any property which hath accrued or shall accrue to the party so offend-

(*e*) These Acts are perpetual; and it has been held that, although the Act under which the Commissioners were appointed have expired, still the Attorney general may, under the authority of those mentioned in the text, proceed upon any certificate of the Commissioners, made while their authority was in existence. Attorney general v. Bullin, Rolls, Jan. 22, 24, 1835.

(*f*) Attorney general v. Lord Ashburnham, 1 S. & S. 394.

ing by force of such marriage; and such Court shall have power in such suit to declare such forfeiture, and thereupon to order and direct that all such estate, right, title and interest in any property as shall then have accrued or shall thereafter accrue to such offending party by force of such marriage, shall be secured under the direction of such Court for the benefit of the innocent party, or of the issue of the marriage, or of any of them, in such manner as the said Court shall think fit, for the purpose of preventing the offending party from deriving any interest in real or personal estate, or pecuniary benefits, from such marriage; and if both the parties so contracting marriage shall in the judgment of the Court be guilty of any such offence as aforesaid, it shall be lawful for the said Court to settle and secure such property, or any part thereof, immediately for the benefit of the issue of the marriage, subject to such provisions for the offending parties, by way of maintenance or otherwise, as the said Court, under the particular circumstances of the case, shall think reasonable, regard being had to the benefit of the issue of the marriage during the lives of their parents, and of the issue of the parties respectively by any future marriage, or of the parties themselves in case either of them shall survive the other.

In all cases of informations which immediately concern the rights of the Crown, its officers proceed upon their own authority, without the intervention of any other person; (*g*) but where the information does not immediately concern the rights of the King, they generally depend upon the relation of some person *whose name is inserted in the information, and who is termed the *Relator*. (*h*) This person in reality sustains and directs [*12] the suit, and he is considered as answerable to the Court and the parties for the propriety of the proceedings, and the conduct of them. (*i*) It sometimes happens that this person has an interest in the matter in dispute, of the injury to which interest he is entitled to complain. In this case his personal complaint being joined to and incorporated with the information given to the Court by the officer of the Crown, they form together an information and bill, and are so termed. In some respects, however, they are considered as distinct proceedings; and the court will treat them as such, by dismissing the bill and retaining the information, even though the relief to be granted is different from that prayed. Thus in *Attorney general* v. *Vivian*, (*k*) where the record was both an information for a charity and a bill, and the whole of the relief specifically prayed was in respect of an alleged interest of the relator in the trust property, which he did not succeed in establishing, Lord Gifford, although he dismissed the bill with costs, retained the information for the purpose of regulating the charity.

But although it is the general practice, where the suit immediately concerns the rights of the Crown, to proceed without a relator, yet instances have sometimes occurred where relators have been named. In such cases, however, it has been done through the tenderness of the officers towards the defendant, in order that the Court might award costs against the relator if the suit should appear to have been improperly conducted, it being a prerogative of the Crown not to pay costs to a subject. (*l*)

It has been said, that as the King by reason of his prerogative does not pay costs to a subject, so it is beneath his dignity to receive them. But many instances occur in the course of practice, in which the Attorney general receives costs. In the Court of Exchequer it is the every day practice for the Crown to receive costs in interlocutory applications which are refused; and in the

(*g*) Ld. Red. 18; Attorney general v. ——, Vern. 277, 370; Attorney general v. Croft, 1 Bro. P. C. 222.

(*h*) Ld. Red. 18; 2 Ves. J. 247, *n*.

(*i*) Ld. Red. 18.

(*k*) 1 Russ. 226; 2 Swan. 215.

(*l*) Vide 3 Bl. Com. 400.

Court of Chancery, when collusion is suspected between the defendants and the relators, the Attorney general attends by a distinct solicitor, and always [*13] receives his *costs. In *Attorney general* v. *Lord Ashburnham*, (*m*) Sir J. Leach. V. C., said, in reference to the asserted principle that the Crown can neither pay nor receive costs, "I find no such principle in Courts of Equity. The Attorney general constantly receives costs, where he is made a defendant in respect of legacies given to charities; (*n*) and even where he is made a defendant in respect of the immediate rights of the Crown in cases of intestacy, and where charity informations have been filed by the Attorney general, costs have been frequently awarded him in interlocutory matters, independently of the relator." It should be remembered here, that in the case of *Attorney general* v. *Dickson*, referred to by Mr. Beames, in his "Summary of the Doctrine of Costs in Equity," page 83, n. 2, as being *sub judice*, in which the question was, whether the Crown, in the case of a simple contract debtor to it, can pay or receive costs, has since been decided, and that no costs were given to the Crown, although the demurrer was in its favour. (*o*)

The propriety of naming a relator for the purpose of his being answerable for costs, and the oppression arising from a contrary practice, were particularly noticed by Baron Perrot, in a cause in the Exchequer, *Attorney General* v. Fox, (*p*) in which case no relator was named; and though the defendants finally prevailed, they were put to an expense almost equal to the value of the property in dispute. The introduction of a relator, however, in cases in which the information is merely concerning the rights of the Crown, is a mere act of favour on the part of the Crown and its officers; and it appears to have been the opinion of Lord Eldon that, even in informations concerning charities, the introduction of a relator was an indulgence on the part of the Crown, which though usual might be withheld. *In the Matter of the Bedford Charity*, (*q*) in speaking of informations concerning charities, his Lordship said, that "there is no doubt, that though a relator is commonly required for the purpose of securing costs, the Attorney General may, if he pleases, proceed without a relator." [*14] This *dictum* *appears to be at variance with the opinion of Lord Thurlow, in the *Attorney General* v. *Oglander*, (*r*) in which his Lordship is reported to have expressed his belief that an information without a relator would not do; and the opinion of Lord Thurlow upon this point appears to have been adopted by Lord Redesdale. (*s*) But it is worthy of remark that in the cases which are referred to as authorities upon this subject in the margin, of *Attorney General* v. *Oglander*, the point does not appear to have arisen; (*t*) and with respect to another case, referred to by the Annotator upon Mr. Vesey's Reports, (*u*) to show the necessity of there always being a relator, it is to observed, that it was a case arising upon a plea of outlawry in the relator, which was held to be a good plea; but the decision was given upon the ground that, although the Attorney General was plaintiff, yet the relator was to have the whole benefit or loss of the suit, and was himself a party to it, for it would abate by his death, &c., and the King's name was only made use of by the form of the Court, and he was not directly concerned at all, and very little by consequence, and the suit was not for the King's duty, but for the relator's interest. Upon the whole, therefore, it seems, that although in cases of informations for charities, the general and almost universal practice is

(*m*) 1 S. & S. 394.
(*n*) Moggridge v. Thackwell, 7 Ves. 36, 88.
(*o*) 1 Sim. & S. arg. 395.
(*p*) Ld. Red. 19.
(*q*) 2 Swan. 520.
(*r*) 1 Ves. J. 246.
(*s*) Ld. Red. 78.
(*t*) Attorney General v. Smart, 1 Ves. 72; Attorney General v. Middleton, 2 Ves. 327.
(*u*) Attorney General of the Duchy v. Heath, Prec. in Ch. 13.

to have a relator for the purpose of answering the costs, yet the rule is not imperative; and the Attorney General, as the officer of the Crown, may, in the exercise of his discretion, exhibit such an information without a relator. In confirmation of this it is to be observed, that in informations under the statute, (x) for giving additional facilities in applications to Courts of Equity regarding the management of estates or funds belonging to charities, it is not the practice to have a relator.

All persons, who are not under any of the legal disabilities after mentioned, may be relators in informations concerning charities; and it seems that dissenters may fill that character for dissenting charities, (y) and that the maintenance of a Protestant *dissenting chapel is considered a charitable institution for this purpose. (z) [*15]

It does not appear to be required in cases of charities, that the relator should be personally interested in the charity, though from what was said by Lord Hardwicke in *Attorney General* v. *Bucknall*, (a) it appears that some interest in the relator, however remote, was considered necessary. Lord Gifford, (M. R.) however, in *Attorney General* v. *Vivian*, (b) says, "whatever opinions may have been previously entertained upon this subject, I conceive it is not necessary for relators to have any interest in the subject of the suit.

If an information is exhibited at the relation of a person not interested in the charity, and it appears that there is ground for the interference of the Court, though he is mistaken in the relief prayed, the Court will take care, at the hearing, to decree in such a manner as will best answer the purposes of the charity, (c) even though the specific relief prayed by the information is refused. (d) But it seems that where a person who, in the event of a particular construction of the will or deed by which the charity is founded being considered correct, would be personally interested in the charity, files an information in which he is the relator, insisting upon that construction, and praying relief accordingly, but fails in establishing his case, the information will be dismissed. Thus where a question arose between two charities, one for poor people in a particular parish, and the other for poor widows in an almshouse, concerning the right to a legacy given by a will in which there were descriptions applicable to both, and an information was filed at the relation of the latter, the Lord Chancellor (Lord Thurlow) dismissed the information because the relators had no title. (e)

*If, however, a person files an information as a relator, claiming the benefit of the charity for himself, and insisting upon his claim [*16] under a title as to which it appears that he is mistaken, though he be found to be entitled under another title upon which he does not insist, a decree will be made. Thus, where the curate of a chapel filed an information in the name of the Attorney General, in which he himself was the relator, claiming the benefit

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(x) 59 Geo. 3, c. 91, continued and extended by 2 Will. 4. c. 57.

(y) Attorney General v. Lord Dudley, Cooper, 146.

(z) Attorney General v. Fowler, 15 Ves. 85.

(a) 2 Atk. 328.

(b) 1 Russ. 236. In this respect an information differs from a petition under the 52 Geo. 3, c. 101, as persons presenting petitions under that Act must, according to the opinion expressed by Lord Eldon in the case of the Bedford Charity, 2 Swanst. 518, have an interest in the charity.

(c) 2 Atk. 328.

(d) *Per* Lord Eldon, in Attorney General v. Whitely, 11 Ves. 247; *Vide etiam* Attorney General v. Scott, 1 Ves. 413; Attorney General v. Mayor of Stamford, 2 Swan. 591; Attorney General v. Parker, 1 Ves. 43; Attorney General v. Smart, 1 Ves. 72; 2 Ves. 426; Attorney General v. Bolton, 3 Anst. 820.

(e) Attorney General v. Oglander, 1 Ves. J. 246.

of an augmentation under the 29 Car. 2, c. 8, and the relator founded his case on a right of nomination in the rector, but the defendant proved a right of nomination in the vicar, by whom the relator had been nominated, it was insisted, that though a right was in the relator, yet he must recover according to the right he had set up; but Lord Hardwicke was of opinion, that although if it had been a bill by the curate in his own name, he never could have made a decree to establish a right appearing in him contrary to that set up, yet this, being an information in the name of the Attorney General, is an answer to that also; for though such an information to establish a charity is mistaken in the circumstance of laying it, yet if it appears that there is a charity, and the right appears in the whole cause, that information cannot be dismissed, but a decree must be made to establish that charity. (*f*) This doctrine, his Lordship observed, "has been frequently laid down in this Court and allowed, because it is considered as a proceeding by an officer of the Crown; and as the King is *pater patriæ*, the information therefore must not be dismissed: so that though the relator has mistaken his title, however in the cause a title comes out for him and his successors, he must have that title established." (*g*)

There is a case in the Precedents in Chancery, (*h*) where a plea of outlawry in disability of the person of the relator in an information, is said to have been allowed in the Duchy Court of Lancaster. But upon reference to the case, it will be seen that it was the case of an information by the Attorney General, *at the relation of a part owner of coal mines against the other part owners, praying that the defendants might contribute towards certain expenses which the relator had been put to in draining and improving the mines, without which they could not be wrought, so the King would lose his duty; so that in fact the relator was the substantial plaintiff in the suit, and the King's name was only made use of as a matter of form, "the Crown not being directly concerned, and only very little as a matter of consequence." Indeed, the relator is stated in the report to have been himself a party to the suit, so much so that it would have abated by his death.

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From the above case it appears, that where a relator himself claims an interest in the subject matter of the suit, and proceeds by bill as well as by information, making himself both plaintiff and relator, the suit will abate by his death. Where, however, the suit is merely an information, the proceedings do not abate by the death of the relator, (*i*) they can only abate by the death or determination of interest of the defendant. (*k*)

If there are several relators, the death of any of them, while there survives one, will not in any degree affect the suit; but if all the relators die, or if there is but one, and that relator dies, the suit is not abated, but the Court will not permit any further proceedings till an order has been obtained for liberty to insert the name of a new relator, and such name is inserted accordingly, otherwise there would be no person to pay the costs of the suit in case the information should be deemed improper, or for any other reason should be dismissed. (*l*) Where, however, a relator dies, the application for leave to name a new relator must be made by the Attorney General, and not by the defendant, otherwise the defendant might choose his own prosecutor. (*m*)

(*f*) This rule only applies when it is a charity instituted by a private person, not to cases of charities incorporated by royal charter under the great seal, for they are already established. Attorney General v. Middleton, 2 Ves. 328.

(*g*) Attorney General v. Brereton, 2 Ves. 425.

(*h*) Attorney General of the Duchy of Lancaster v. Heath, Prec. Ch. 13.

(*i*) Waller v. Hanger, 2 Bulst. 134. (*k*) Ld. Red. 78.

(*l*) Ld. Red. 79.

(*m*) Attorney General v. Plumtree, 5 Mad. 452.

With respect to informations on behalf of idiots and lunatics, it seems that it is not only necessary that the lunatic should be a party, but it is also requisite that there should be a relator who may be responsible to the defendant for the costs of the suit. Thus in the case of the *Attorney General* v. *Tyler*, *mentioned in the note to Lord Redesdale's Treatise, (n) it [*18] appears that the lunatic had been made the relator, but that on a motion being made that a responsible relator should be appointed, Lord Northington directed that all further proceedings in the cause should be suspended until a proper person should be named as relator in his stead. This appears to be the same cause which has been before referred to, as reported in Mr. Dickens' Reports, (o) in which, upon the hearing, it was objected that the lunatic was not a party to the suit, although he was named as relator, and the cause was consequently ordered to stand over, with liberty to amend by adding parties, and, if so advised, to change the information into a bill.

The object in requiring that there should be a relator in informations exhibited on the part of the Attorney General, is, as we have seen, that there may be some person answerable for the costs, in case they should have been improperly filed. Thus in the case of *Attorney General* v. *Smart*, (p) before referred to, where the information was held to have been unnecessary, and contrary to the right, the costs were ordered to be paid by the relator. And so in *Attorney General* v. *Middleton*, (q) where the relator failed in establishing his case, and it appeared that he had acted upon improper motives in filing the information, he was decreed to pay the costs. In like manner, where there was only a general allegation in the information of a right to elect a curate, which was not proved, the Court dismissed the information with costs. (r)—But in the case of *Attorney General* v. *Oglander*, (s) before referred to, where the relator insisted upon a particular construction of the will of the person by whom the charity was founded, and in which there was considerable ambiguity, although he failed in satisfying the Court that his construction was the right one, and the information was consequently dismissed, the Court did not make him liable to the costs of the defendant, although it refused to permit the costs to be paid out of the funds of the charity. And in general, where an information prays a relief, *which is not granted, but the Court thinks [*19] proper to make a decree according to the merits, so that the information is shown to have had a foundation, although the relief is not such as the relator prayed, the relator will not be ordered to pay the costs, (t) unless indeed it appears, as it did in the case of *Attorney General* v. *Oglander*, (u) that he has filed the information for the purpose of establishing a construction by which he himself is to be benefitted. In such cases, it seems that, although it is the duty of the Court to grant the proper relief, the terms to be imposed between the parties, as to costs, are altogether in the discretion of the Court; and therefore where an information had been filed involving most expensive inquiries, and containing unfounded imputations on the conduct of individuals, and allegations not proved, upon which no relief was given or could be sought, Lord Eldon, although he made a decree granting relief, (but which was not the relief prayed for,) refused to allow the costs out of the charity estates, and directed them to be paid by the relators. (x)

(n) Ld. Red. 23: *vide* 2 Eden. 230. S. C.
(o) *Ante*, p. 8.
(p) 1 Ves. 72.
(q) 2 Ves. 327.
(r) Attorney General v. Parker, 3 Atk. 576; 1 Ves. 43, S. C.
(s) 1 Ves. J. 246.
(t) Attorney General v. Bolton, 3 Anst. 820.
(u) *Supra*.
(x) Attorney General v. Hartley, 2 J. & W. 353; *vide etiam* Att. Gen. v. Mayor of Stamford, 2 Swan, 591.

In general, however, where relators conduct themselves properly and their conduct has been beneficial to the charity, they are allowed their costs. Thus in *Attorney General* v. *The Brewers' Company*, (*y*) the relators (in the report erroneously called the plaintiffs) were allowed their costs out of the improved rents of the charity estates, because they had been serviceable to the charity by easing it of a debt which was claimed against it. (*z*) And it seems that in some cases the costs of relators will be taxed as between solicitor and client, as otherwise people would not come forward to file informations. (*a*)

This practice, however, does not appear to be general, although it is often adopted in cases of charities. (*b*)

As the principal object in having a relator is, that he may be answerable for the costs of the proceedings, in case the information *shall appear [*20] to have been improperly instituted or conducted, it follows as a matter of course that such relator must be a person of substance, and if it is made to appear to the Court, after the information is filed, that the relator is not a responsible person, all further proceedings in the information will be suspended till a proper person shall be named as relator. (*c*)

It is to be observed, that an information by the Attorney General cannot be dismissed for want of prosecution, it is his privilege to proceed in what way he thinks proper; but an information in his name by a relator, is subject to be dismissed for want of prosecution with costs. (*d*)

SECTION II.

The Attorney General of the Queen Consort.

As the Queen Consort is in law a public person exempt and distinct from the King, and may purchase and acquire lands and separate property in goods, and dispose of them by will (*e*) or otherwise, without the concurrence of her husband, and is to all intents and purposes a *feme sole*, so she may sue and be sued without her husband being joined in the proceedings. (*f*) But, like the King, she does not sue, nor is she sued in her own name; and as she has an Attorney and Solicitor General of her own, suits in equity in her behalf are commenced by her Attorney General by information, and not by bill. (*g*)

It seems that a Queen Dowager (*h*) has not the same privilege as a Queen Consort.

[*21] *SECTION III.

The Attorney General to the Prince of Wales.

The Prince of Wales, as Duke of Cornwall, may also, as has been shown, sue in the King's Courts, for matters relating to that duchy, by information in

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(*y*) 1 P. Wms. 376. (*z*) Beames on Costs, 24.

(*a*) Attorney General v. Taylor, cited in Osborne v. Denne, 7 Ves. 424.

(*b*) 7 Ves. 425; *vide etiam* Attorney General v. Carte, 1 Dick. 113; Beames on Costs, App. 343, S. C.; and Moggeridge v. Thackwell, 7 Ves. 36.

(*c*) Att. Gen. v. Tyler, 2 Eden. 230.

(*d*) In the Court of Exchequer the order in such case is, that the defendant *may go without a day*, upon payment of his costs to be taxed, 1 Fowler, 104.

(*e*) 39 & 40 Geo. 3, c. 88. (*f*) 1 Bl. Com. 219.

(*g*) 17 Vin. Ab. tit. Prerog. B. e. pl. 1.

(*h*) *Vide* Attorney General v. Tarrington, Hardres 219.

the name of his Attorney General; but whether his right to do so arises merely from his being in possession of the dukedom, or is consequent upon his dignity as *Prince of Wales*, does not clearly appear; and it should be mentioned, with reference to this point, that there is one precedent of an information by the Attorney General of the Prince, in his character of Prince, touching the reversion to a wood in Devonshire, which had been granted to him. (*a*)

It seems that where there is no Prince of Wales, an information relating to the rights of the Duchy of Cornwall, is filed by the King's Attorney General; and that where there is a Prince of Wales, but he is under age, the information is usually filed by the King's Attorney General, joining with him the Attorney General for the Prince as Duke of Cornwall. (*b*)

In a case where an information was filed by the Attorney General for the Prince of Wales as Duke of Cornwall, and the Prince died, the suit was revived by an information in the nature of a bill of revivor filed by the King's Attorney General, and a demurrer to the information was over-ruled. (*c*)

SECTION IV.

Governments of Foreign States.

It seems to have been considered by Lord Thurlow as a doubtful point whether the sovereign of a foreign state can sue in the municipal courts of this country, and whether the claims of such a person are not matter of application from state to *state. (*a*) The point, however, has been lately determined in the affirmative, in the case of *The King of Spain* [*22] v. *Machado*, (*b*) which was a bill filed on behalf of the King of Spain and of two other persons resident in London, claiming some property which had been received by one of the defendants under a treaty between France and Spain, and which it was alleged was the property of the King of Spain. To this bill a general demurrer was put in; and amongst other grounds of demurrer it was contended, that being a foreign absolute sovereign, he was not capable of maintaining a suit in a Court of Equity here, or at least, that he was not capable of maintaining a suit for the enforcement of alleged rights belonging to him only in his royal character. This demurrer was allowed by Lord Lyndhurst, but upon a different ground, namely, that the parties who had been joined with the King of Spain as co-plaintiffs, had no interest in the subject-matter of the suit, and after the allowance of the demurrer, the King of Spain alone filed another bill against the same defendants, for the same purposes as before, and the defendants demurred again, but the demurrer was over-ruled by the Lord Chancellor, (*c*) and his Lordship's judgment has been confirmed by the House of Lords on appeal.

To entitle a foreign government to sue in the Courts of this country it is necessary that it should have been recognized by the government here. This

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(*a*) *Vide* The judgment of Ld. Ch. B. Macdonald, in Attorney General of Prince of Wales v. Sir J. St. Aubyn, Wightw. 167.

(*b*) Ibid.

(*c*) Attorney General v. The Mayor, &c. of Plymouth, Wightw. 134.

(*a*) Barclay v. Russell, 3 Ves. J. 431; *vide etiam* The Nabob of the Carnatic v. The East India Company, 1 Ves. J. 371, in which the authorities upon this point are collected.

(*b*) 4 Russell, 225; *vide etiam* City of Berne v. Bank of England, 9 Ves. 347; Dolder v. Bank of England, 10 Ves. 353; Dolder v. Lord Huntingfield, 11 Ves. 283.

(*c*) King of Spain v. Machado, 4 Russ. 560; *vide etiam* The Columbian Government v. Rothschild, 1 Sim. 94.

point appears to have been first discussed in the case of *The City of Berne in Switzerland* v. *The Bank of England*, (*d*) which arose from the application of a person describing himself as a member of the common-council chamber of the city of Berne, on behalf of himself and of all others the members of the common council chamber and the burghers and citizens of that city, to restrain the Bank of England and South Sea Company from permitting the transfer of [*23] certain funds standing in the name of trustees under a purchase *by the old government of Berne before the revolution: the application was opposed on the ground that the existing government of Switzerland, not being acknowledged by the government of this country, could not be noticed by the Court; and Lord Eldon refused to make the order, observing, that it was extremely difficult to say that a judicial court can take notice of a government never authorized by the government of the country in which the court sits; and that whether the foreign government was recognized or not, was matter of public notoriety. The same case afterwards came before the Court upon two different occasions, (*e*) when the question, whether a foreign government not acknowledged by this country, could sue in the courts here, was incidentally discussed; but although no final decision was come to upon this point, the case having been determined upon other points, Lord Eldon did not appear to have entertained a different opinion upon this subject from that which he had before thrown out: so that the fair inference to be drawn from these cases is, that though the government of a foreign state, which has been acknowledged by the government of this country, may sue in the courts of this country upon questions between that government and private individuals, yet that such suit cannot be maintained if the government of the foreign state is not acknowledged by the government here.

The fact of a foreign government not having been acknowledged, is a matter of public notoriety, and must be judicially taken notice of by the Court, even though there is an averment introduced into the bill, that the government in question has been recognized. (*f*) Thus, where in order to prevent a demurrer it was falsely alleged in the bill that a revolted colony of Spain had been recognized by Great Britain as an independent state, and a demurrer was nevertheless put in, the Vice Chancellor allowed the demurrer, observing, that if the plaintiff makes the fact, that this is an independent government recognized by the government of this country, where it is not so, the foundation of his case, the Court must judicially take notice of what is the truth of the fact, notwith- [*24] standing the averment on the record, *because nothing is taken to be true except that which is properly pleaded, and that when a fact is pleaded which is historically false, and which the judges are bound to take notice of as being false, it cannot be said to have been properly pleaded merely because it is averred, and the Court must take it just as if there had been no such averment on the record. (*g*)

Where a foreign state comes for the aid of this Court in the assertion of its rights, it must sue in a form which makes it possible for the Court to do justice to the defendants, therefore, where a bill was filed by the government of the State of Columbia, and a person describing himself as a citizen of that state, and minister plenipotentiary for the same to the court of his Britannic Majesty,

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(*d*) 9 Ves. 347.

(*e*) Dolder v. Bank of England, 10 Ves. 353; Dolder v. Lord Huntingfield, 11 Ves. 283.

(*f*) Taylor v. Barclay, 2 Sim. 213.

(*g*) The courts of this country will not entertain a suit for matters arising out of contracts entered into by individuals with the governments of foreign countries, which have not been acknowledged by the Government of this country. *Vide* Thompson v. Powles, 2 Sim. 194, and the cases there cited.

and residing at No. 33, Baker street, Portman square, in the county of Middlesex, the Vice Chancellor, Sir J. Leach, held, that the bill could not be sustained, because there was no public officer named who was entitled to represent the interest of the state, and upon whom process could be served on the part of the defendants, in case they were advised to file a cross bill and to require an answer. (*h*)

It seems that a colonial government, existing by letters patent, which is in some degree similar to a corporation possessing rights in England, may sue in England, and ought to be regulated by the law of England, under which it has existence; (*i*) thus in *Penn* v. *Lord Baltimore*, (*k*) Lord Hardwicke made a decree at the suit of the governor of a province in America, claiming under letters patent by which the district, property and government had been granted to his ancestor and his heirs. The suit was for the specific performance of articles executed in England respecting the boundaries of the two provinces of Maryland and Pennsylvania in North America; and Lord Hardwicke, although he admitted that the original jurisdiction, in cases relating to boundaries, between *provinces, was in the King in Council, made a [*25] decree, founding the jurisdiction upon articles executed in England under seal, for mutual considerations, which he considered as giving jurisdiction to the King's Courts both of law and equity, whatever the subject matter might be. (*l*)

SECTION V.

Corporations.

The right to sue is not confined to persons in their natural capacities; the power to sue and be sued in their corporate name is a power inseparably incident to every corporation, whether it be sole or aggregate. (*a*)

As a corporation must take and grant by their corporate name, so by that name they must in general sue and be sued; and they may sue by their true name of foundation, though they be better known by another name. Thus the masters and scholars of the Hall of Valens Mary, in Cambridge, brought a writ by that name, which was the name of their foundation, though they were better known by the name of Pembroke Hall, and the writ was held good. (*b*)

As a corporation by prescription may have more than one name, they may sue by the one name or the other, alleging that they and their predecessors have from time immemorial been known and been accustomed to plead by the one or by the other. (*c*)

A suit, by a corporation aggregate, to recover a thing due to them in their corporate right, must not be brought in the name of their head alone, but in their full corporate name, unless it appear that the Act of Parliament or charter by which they are constituted enables them to sue in the name of their head. Yet though it appear that the head of a corporation is enabled to sue in his own

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(*h*) The Columbian Government v. Rothschild, 1 Sim. 94. It is to be observed, that in this case it was stated at the bar, and does not appear to have been disputed, that it had been decided that an ambassador does not represent his government in a court of justice.

(*i*) Barclay v. Russell, 3 Ves. 434.

(*k*) 1 Ves. 444.

(*l*) Cooper Eq. Pl. 123.

(*a*) 1 Bl. Com. 477.

(*b*) 44 Ed. 3, 35; 1 Kyd on Corp. 253.

(*c*) Vid. 9 Edw. 4, 21; 13 Hen. 7, 14; 16 Hen. 7, 1; and 21 Hen. 6, 4, which last seems *contra*.

[*26] name for anything to which the corporation *are entitled, this will not preclude them from suing by their name of incorporation: thus, where an action of debt was brought in the name of the President and College of Physicians to recover the penalty of 5*l.* per month, on the stat. 14 Hen. 8, c. 15, for practising physic in London without a licence, on demurrer to the declaration, this objection, among others, was taken, that the action ought to have been brought in the name of the College only, or of the President only; the words of the patent being "*quod ipse per nomina Presidentis Collegii seu communitatis facultatis medicinæ London*, should sue and be sued." To this it was answered that they were incorporated by the name of President and College, and had, in consequence of that, a power to sue and be sued by that name; and that this power was not taken away by the additional affirmative power which was given them. (*d*)

It has been determined that where an Act of Parliament grants any thing to a corporation, the grant shall take effect, though the true corporate name be not used, provided the name actually used be a sufficient description of the corporation; but it is doubtful whether, in suing to enforce its claim under that Act, it can use the name therein mentioned. The only case which occurs on this subject is the following:—

The University of Cambridge was incorporated by the name of Chancellor, Masters and Scholars. The statute, (*e*) which disables Popish recusants convict from presenting to benefices, vests such presentations in the Chancellor and Scholars of the two Universities, distinguishing the counties within which each of them shall respectively present. The University of Cambridge brought a *quare impedit* against the Archbishop of York, by the name of the Chancellor and Scholars; and the defendant pleaded in abatement that the University was incorporated by the name of Chancellor, Masters and Scholars, and that therefore they had sued by a wrong name. The Court of Common Pleas gave judgment of "*respondeas ouster*," on which the defendant brought a writ of error in the King's Bench.

In favour of the University it was argued that a corporation may have one [*27] name by which they may take, and another by *which they may sue: (*f*) it did not therefore follow that because the University was incorporated by one name they could not sue by another; the Act of Parliament vesting this right in them, by the name of Chancellor and Scholars, was an incorporation of them as to this particular purpose; this could be done by letters patent; (*g*) much more might it be done by Act of Parliament; and if this were so, the very Act of Parliament was a falsification of the plea. To this it was answered, that, if the University had in fact one name by which they might take, and another by which they might sue, they ought to have shown it; that the Act of Parliament operated only as a description of person, as a devise would do, and not as an incorporation to a specific purpose.

Parker, C. J. observed, that the declaration set forth the Act of Parliament as an authority to sue by that name, which put it on the defendant to show some special matter to avoid it, as the acceptance of another charter by another name, at a time subsequent to the Act. Powys, senior, said, that "Chancellor and Scholars" was such a name as comprehended the whole University, for that it included both head and members. The other two Justices, Eyre and Powys, jun., said, that it did not follow that what was sufficient as a description to enable a person to take, was a name by which he might sue. (*h*)

(*d*) 2 Salk. 451.
(*e*) 3 Jac. 1, c. 5, f. 18, 19, 20.
(*f*) 1 Rol. 513.
(*g*) 2 Hen. 7, 13; 4 Leon. 190.
(*h*) 12 Mod, 207, 208; 1 Kyd, 256.

We have seen before that a corporation cannot, unless specially authorized by their constitution, sue by their head alone; so neither can a corporation aggregate, which has a head, sue or be sued without it, because without it the corporation is incomplete, (*i*) It is not, however, necessary to mention the name of the head, (*k*) nor is it necessary in the case of corporations aggregate to name any of the individual members by their proper christian and surnames; (*l*) but if, in a suit in equity by the members of a corporation in their corporate capacity, they are mentioned by their names, the suit will not become defective by the death of *some of the members, although it would have abated if the suit had been by them in their individual characters. [*28] Thus where the warden and fellows of Manchester College filed a bill for tithes in their corporate capacity, but in their proper names, in which a decree was pronounced, from which both the plaintiffs and defendants appealed, and pending the appeal two of the fellows died; two new fellows were elected in their place, and an objection was taken, on the ground that the new fellows were not parties; Lord Eldon held that there was no defect of parties, and directed the appeal to proceed. (*m*)

A sole corporation suing for a corporate right, having two capacities, a natural and a corporate, must always show in what right he sues. (*n*) Thus a bishop of prebendary, suing for land which he claims in right of his bishopric or prebend, must describe himself as bishop or prebend; and if a parson sue for any thing in right of his parsonage, he ought to describe himself as parson. In this respect a sole corporation differs from a corporation aggregate, because the latter having only a corporate capacity, a suit in their corporate name can be only in that capacity. (*o*) It also differs from corporations aggregate, in that by the death of a corporation sole, a suit by him, although instituted in his corporate capacity, becomes abated, which is not the case, as we have seen before, with respect to suits by corporations aggregate.

It is to be observed, that in cases of abatement by the death of corporations sole, there is a material distinction with regard to the right to revive. If the plaintiff was entitled to the subject-matter of the suit for his own benefit, his personal representatives are the parties to revive; but if the plaintiff was only entitled for the benefit of others, there his successor is the person who ought to revive. Thus if the master of an hospital, or any similar corporation, institute proceedings to recover the payment of an annuity and die, his successor shall have the arrears, and not his executors, because he is entitled only as a trustee for the benefit of his house; but it is otherwise in the case of a parson; there the executors are entitled, *and not the successor, because he was entitled to the annuity for his own benefit. (*p*) [*29] On the same principle, if a rent to a dean and chapter be in arrear, and the dean die, there is no abatement, because the rent belongs to the succeeding dean and chapter; but if the rent be due to the dean in his sole corporate capacity, it shall go to his executors, and they must revive. (*q*)

Although corporations aggregate are entitled to sue in their corporate capacity, the Court will not permit parties to assume a corporate character to which they are not entitled; and where it appears sufficiently on the bill that the plaintiffs have assumed such a character without being entitled to it, a demurrer will hold. Thus in the case of *Lloyd* v. *Loaring* (*r*) where a bill was filed by some of the members of a lodge of freemasons against others, for the delivery

(*i*) 2 Bac. Ab. tit. Corp. C. 3, pl. 7.
(*l*) 2 Inst. 666.
(*n*) 2 Bac. Ab. Corporation, E. 2.
(*p*) 1 Kyd on Corpor. 77.
(*r*) 6 Ves. 773.
(*k*) 1 Kyd, 281.
(*m*) Blackburn v. Jepson, 3 Swanst. 138.
(*o*) Ibid.
(*q*) Ibid. 78.

up of certain specific chattels, in which bill there was great affectation of a corporate character, in stating their laws and constitutions, and the original charter by which they were constituted; a demurrer was allowed, "because the Court will not permit persons who can only sue as partners, to sue in a corporate character; and, upon principles of policy, the Courts of this country do not sit to determine upon charters granted by persons who have not the prerogative to grant them."

It is to be observed, that in the above case of *Lloyd* v. *Loaring*, Lord Eldon gave the plaintiffs leave to amend their bill, by striking out their present style as plaintiffs, and suing as individuals on behalf of themselves and the other persons interested, his lordship saying that he had seen strong passages, as falling from Lord Hardwicke, that where a great many individuals are jointly interested, there are more cases than those which are familiar, of creditors and legatees, where the Court will let a few represent the whole. (*s*) Ever since that period it has been held, that where all parties stand in the same situation and have one common right and one common interest, two or three or more may sue in their own names for the benefit of all; and upon this principle large partnerships, or associations in the nature of joint stock companies, although not in-
[*30] corporated, *have been permitted to maintain suits instituted in the name of a few or more individuals interested on behalf of themselves and the other partners in the concern. (*t*)

It may be noticed here that many joint stock companies or associations for insurance, trading, and other purposes, have from time to time been established by Acts of Parliament, which, although they have not formed them into corporations, have still conferred upon them many privileges, in consequence of which such companies have acquired something of a corporate character; amongst other privileges so conferred, may be reckoned that of suing and being sued in the names of their principal officers. The history of these companies or associations, and of the provisions which have from time to time been introduced into Acts of Parliament, creating or regulating them, has been detailed at considerable length by Lord Eldon, in *Van Sandau* v. *Moore*; (*u*) and his lordship's observations may be useful to those upon whom the duty may devolve of framing suits on behalf of or against persons connected with the different classes of joint stock companies there enumerated. It will suffice, however, for our present purpose, to observe, that although under Acts of Parliament of this description it is competent for the company to maintain suits in the names of the officers designated in the Acts, yet where any of the company wish to sue the directors or others, who are members as well as themselves, they may maintain such a suit in their own individual capacities, either suing by themselves and making the rest of the company defendants, (*x*) or suing on behalf of themselves and the other members of the association who may come in and contribute to the expenses of the suit. This appears to be the result of the decision in *Hichens* v. *Congreve*. (*y*) In that case, the company had been established by an Act of Parliament, which contained a clause whereby it was
[*31] declared that all proceedings, whether at law or in equity, to be carried *on by or on behalf of the company against any person or persons, *whether such person or persons should be a member or members* of the

(*s*) 6 Ves. 779.

(*t*) *Vide* Chancey v. May, Prec. in Ch. 592; Good v. Blewitt, 13 Ves. 397; Cockburn v. Thompson, 16 Ves. 321; Pearce v. Piper, 17 Ves. 1; Blain v. Agar, 1 Sim. 37; Gray v. Chaplin, 2 Sim. and S. 267; and 2 Russell, 126; Van Sandau v. Moore, 1 Russell, 441; *vide post*.

(*u*) 1 Russell, 441, 458.

(*x*) Van Sandau v. Moore, 1 Russell, 441.

(*y*) 4 Russell, 562.

company or not, should be instituted and carried on in the name of the chairman or of one of the directors, as the nominal plaintiff; the questions which arose in the suit, the object of which was to compel some of the directors, to refund moneys improperly withdrawn by them from the stock of the company, were principally whether such a suit could be maintained by a few of the partners in the concern, suing on behalf of the others, without bringing the other partners before the Court? and whether, if such a suit could be instituted, the form of proceedings prescribed by the Act of Parliament ought not to have been followed? and upon these questions, Lord Lyndhurst, upon overruling the demurrer which had been put into the bill, observed, "It has been argued that the case comes within the clause of the Act of Parliament. I doubt whether the terms of the clause are sufficient to comprehend it, and the spirit of the Act does not extend to transactions such as are in question here. The clause was introduced in order that where the company was concerned on the one side, and individuals contracting with it, being perhaps at the same time members, were concerned on the other, suits might be carried on without being impeded by the objections which would otherwise have occurred."

By a recent Act of Parliament, passed for the purpose of facilitating the formation of associations for trading, charitable, literary and other purposes, which associations it might be inexpedient to incorporate by Royal charter, although it might be expedient to confer upon them some of the privileges incident to corporations created by Royal charter, the King is empowered by his letters patent to grant to any company or body of persons associated together for any of the above purposes, and to the heirs, executors, administrators and assigns of any such persons, although not incorporated by such letters patent, any privilege or privileges which, according to the rules of the common law, or in pursuance of the Act of the 6 Geo. 4, c. 91, it would be competent to His Majesty to grant to any such company or body of persons *in and by any [*32] charter of incorporation, *and especially the privilege of maintaining and defending actions, suits, prosecutions and other proceedings, both at law and in equity, in the name or names of any one or more of the principal officers for the time being of any such associations respectively;* and in order that the issuing of such letters patent, and the name or names of the principal officer or officers for the time being of the several associations thereby constituted may be made known to the public, it is by the second section of the same Act enacted, that an entry of the grant of such letters patent, and of the name or names of the principal officer or officers therein designated, or who may from time to time be appointed by virtue of the powers contained in such letters patent, shall be made in a book to be kept for that purpose in the office of the Clerk of the Patents, and that the same shall be open for inspection, at all reasonable times, by any person requiring the same, on payment of a fee of one shilling only. And it is further enacted, that a sufficient notice or memorandum of such letters patent, together with the name or names of the principal officer or officers, shall be advertised in the London Gazette within one calendar month from the date of such letters patent, and also in some one newspaper published or circulating in the county or place where the meetings of any association shall be usually held; and also, that upon the death or change from any other cause whatever of any such principal officer or officers, the name or names of the person or persons succeeding him or them shall in like manner be recorded in the office of the Clerk of the Patents, and advertised in the London Gazette, or in some one newspaper as aforesaid; and the officer or officers so from time to time recorded and advertised shall, for all intents and purposes, be held and considered as the party or parties entitled to sue and to be sued on behalf of his or their respective associations, within the meaning of the Act, and of any patent or patents to be from time to time granted in pursuance thereof.

A suit may be supported in England by a foreign corporation in their corporate name and capacity; and in pleading it is not necessary that they should [*33] set forth the proper names of *the persons who form such corporation, or show how it was incorporated; though if it is *denied*, they must prove that by the law of the foreign country they were effectually incorporated. (z)

SECTION VI.

Persons residing out of the Jurisdiction.

THE rule that all persons, not lying under the disabilities after pointed out, are entitled to maintain a suit as plaintiffs in the Court of Chancery, is not affected by the circumstance of their being resident out of the jurisdiction of the Court, unless they be alien enemies, or are resident in the territory of an enemy without a licence or authority from the Government here.

In order, however, to prevent the defendant from being defeated of his right to costs, it is a rule, that if the plaintiff in a suit is resident abroad, the Court will, on application of the defendant, order him to give security for the costs of the suit, and in the meantime direct all proceedings to be stayed. (a) And it has in one case been decided, that if after such an order the plaintiff omits for a long time to give the security, the defendant has a right to have the bill dismissed; and that for that purpose the Court will, upon motion, order the plaintiff to give the required security by a certain day, or in default direct that the bill may stand dismissed. (b)

It has been held in Ireland, (c) that notwithstanding the 41 Geo. 3, c. 93, s. 5, [*34] by which an attachment is given in England *to enforce an order or decree made in Ireland for the payment of money, a plaintiff residing in England must, on filing a bill in Ireland, give security for costs; (d) and although the same Act applies to persons who are resident in Ireland commencing suits in England, it has been decided in the English Courts, that where a plaintiff resident in Ireland files a bill here, he must also give security. (e) It has likewise been held, that a person resident in Scotland must in like manner give security for costs. (f)

Where there are co-plaintiffs resident in England, the Court will not make

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(z) Dutch West India Company v. Van Meyer, 2 Ld. Ray. 1535.

(a) Wyatt. Prac. Reg. 146. Formerly the practice of the Court was merely to order the plaintiff to give security for costs, before he could oblige the defendant to put in his answer; but though under this order the plaintiff could not compel the defendant to answer, he might nevertheless take other proceedings in the cause, such as suing out a commission to examine witnesses *de bene esse*. To obviate this, it was necessary that the defendant, in applying for the order, should word his motion so as to extend it to restrain all proceedings until security given; but in Fox v. Blew, (5 Mad. 148,) the Vice Chancellor, Sir J. Leach, expressed his opinion that the language of all orders obtained as of course ought to be uniform, and intimated that in future the better way would be to make the order in all cases extend to stay proceedings.

(b) Camac v. Grant, 1 Sim. 348. It was said in Cliffe v. Wilkinson, 4 Sim. 124, arg., that Sir A. Hart, V. C., who made this order, had afterwards expressed doubts as to his being warranted in doing so.

(c) Moloney v. Smith, 1 M'L. & Y. 213.

(d) Mullett v. Christmas. 2 Ball. & B. 422; *vide etiam* Stackpole v. Callaghan, 1 Ball. & B. 566.

(e) Hill v. Reardon, Mad. & Geld. 46; Moloney v. Smith, 1 M'Lell. & Y. 213.

(f) Ker. v. Duchess of Munster, Bunb. 35.

an order that other plaintiffs who are abroad shall give security for costs; (*g*) and where the plaintiff is abroad as a land or sea officer in the service of His Majesty, he will not be ordered to give security; (*h*) and so, where he is resident abroad upon public service, as an ambassador or consul, he cannot be called upon to give security; but peers of the realm, although they are privileged from personal arrest, must, if they reside abroad, give security for costs, for although such costs cannot be recovered by personal process, they may by other process, if the plaintiff is resident in this country. (*i*) And it may be stated as a general rule, that wherever a plaintiff is out of the jurisdiction, the defendant is entitled to security for costs, unless it is distinctly shown that the plaintiff is exempted from his liability. (*k*)

A plaintiff cannot be compelled to give security for costs, unless he himself states upon his bill that he is resident out of the jurisdiction, or unless the fact is established by affidavit; and it seems that the mere circumstance of his having gone abroad, will not be a sufficient ground on which to compel him to give security, unless it is stated either by the plaintiff himself, or upon affidavit, that he is gone abroad for the purpose of *residing* there. (*l*)

*In order to entitle a defendant to require security for costs from a plaintiff, he must make his application at the earliest possible [*35] time after the fact has come to his knowledge, and before he takes any further step in the cause; therefore, where the fact of the plaintiff being resident abroad appears upon the bill, he must make his motion before he puts in his answer, or applies for time, either of which acts will be considered as a waiver of his right to the security. (*m*)

If the plaintiff is not described in the bill as resident abroad, and the defendant does not become apprised of that fact before he puts in his answer, he may make the application after answer; if, however, he takes any material step in the cause after he has notice, he cannot then apply. In *Macon* v. *Gardiner*, (*n*) the plaintiff was described in the original bill as *late of the West Indies*, but then of the *City of London*, and the defendant having answered, filed a cross bill against the plaintiff; exceptions, however, were taken to the answer, to which the defendant submitted, and put in a further answer, and then applied to the Court that the plaintiff in the original bill might give security for costs, alleging in his affidavit, that upon application to the plaintiff's solicitor in the original suit to appear for him to the cross bill, he discovered for the first time that the plaintiff did not reside in London, as alleged in the bill, but in Ireland. To this it was answered, (and so it appeared) that the defendant had in his cross bill stated the plaintiff to be resident in Ireland, and after that had answered the exceptions to his answer to the original bill, and had thereby taken a step in the cause after it was evident that he had notice of the plaintiff's being out of the jurisdiction, and Lord Eldon held, that the defendant had thereby precluded himself from asking for security for costs, and therefore refused the motion.

In *Dyott* v. *Dyott*, (*o*) where the defendant had sworn to his answer before

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(*g*) Winthrop v. Roy. Exch. Ass. Company, 1 Dick. 282; Walker v. Easterby, 6 Ves. 612.

(*h*) Colebrook v. Jones, 1 Dick, 154.

(*i*) Lord Aldborough v. Burton, 2 M. & K. 401.

(*k*) Lillie v. Lillie, 2 M. & K. 404.

(*l*) Green v. Charnock, 3 Bro. C. C. 371; 2 Cox, 284, S. C.; 1 Ves. J. 396, S. C. Hoby v. Hitchcock, 5 Ves. 699.

(*m*) Melioruccby v. Melioruccby, 2 Ves. 24; 1 Dick. 147, S. C.; Craig V. Bolton, 2 Bro. C. C. 609; Anon. 10 Ves. 287.

(*n*) 2 Bro. C. C., Ed. Belt. 609, notis. (*o*) 1 Mad, 187.

he had notice of the fact of the plaintiff being resident abroad, but in consequence of some delay in the six clerks' office the answer was not filed till after [*36] the *defendant had been informed of the plaintiff's residence; a motion that the plaintiff might give security for costs was considered too late, although the defendant himself was not privy to or aware of the delay which had taken place in filing his answer.

If a plaintiff, after filing a bill, leave the kingdom for the purpose of settling, and do actually take up his residence in foreign parts, it is in any stage of the cause ground for an order that he shall give security for costs. (*p*) It is presumed, however, that such application ought to be made as early as possible after the defendant has become apprized of the fact; and it is not enough to support such an application to swear that the plaintiff has merely gone abroad, but the affidavit should go on to say further, that he is gone to *settle* abroad. In *Weeks* v. *Cole*, (*q*) an application was made by the defendant, after answer, that the proceedings might be stayed until the plaintiff gave security for costs, on an affidavit that the plaintiff who, when the bill was filed was resident in London, had, since the answer was put in, entirely abandoned the country and gone to reside in the Isle of Man; and Lord Eldon made the order, observing, however, that the plaintiff ought to have an opportunity of answering the affidavit, the propriety of which suggestion is evident from the case of *White* v. *Greathead*, (*r*) where an order for the plaintiff to give security for costs after answer, was refused in consequence of an affidavit which had been filed by the plaintiff's solicitor, stating that the plaintiff had gone to the West Indies merely for the purpose of arranging his affairs, and that he had informed the deponent that he intended soon to return to this country, where he had left his family.

To entitle a defendant to an order that the plaintiff may give security for costs, it is necessary that the plaintiff should absolutely be *gone* abroad, the mere intention to go, will not be sufficient; (*s*) in a case, however, where the plaintiff, who was an alien enemy, was under confinement preparatory to his removal [37*] out of the country, upon a warrant by the *Secretary of State under the Alien Act, the proceedings were stayed until he gave security for costs, although he was not actually gone out of the country. (*t*) In proceedings at Common Law, where after the commencement of an action, and after issue joined, the plaintiff has been convicted of felony and ordered to be transported, the Courts have ordered security to be given for costs, as well retrospective as prospective; (*u*) and it is presumed that Courts of Equity will follow the rule at law; where, however, the plaintiff had not been convicted of felony, but only of a misdemeanor under the 52 Geo, 3, c. 130, s. 2, for poaching, for which he was sentenced to seven years' transportation, and it was admitted that he had not sailed for the place of transportation, but was in a penitentiary place of confinement, the Vice Chancellor refused a motion for stay of proceedings till the plaintiff had given security for costs. (*x*)

From analogy to the course adopted where the plaintiff is resident out of the jurisdiction, the Court will, upon application, restrain an ambassador's servant, whose person is privileged from arrest by the 7 Ann. c. 12, from proceeding with his suit until he has given security for costs. (*y*)

It was an old rule, well established, that where a defendant lived abroad, and was ordered to find security to answer costs, the sum for which the secu-

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(*p*) Anon. 2 Dick. 776.
(*q*) Ibid. 14 Ves. 518.
(*r*) 15 Ves. 2.
(*s*) Adams v. Colethurst, 2 Anst. 552.
(*t*) Seilaz v. Hanson, 5 Ves. 261.
(*u*) Harvey v. Jacob, 1 B. & Ald. 159.
(*x*) Baddeley v. Harding, Mad. & Gel. 214.
(*y*) Anon. Mos. 175; Goodwin v. Archer, 2 P. Wms. 452; Adderley v. Smith, 1 Dick. 355.

rity should be given, should be 40*l.*, and that this sum should not, under any circumstances, be increased upon adverse motion, (*z*) unless where the plaintiff applied to the Court to ask a favour, such as a commission to examine witnesses abroad, in which case further terms might be imposed upon him. (*a*) It was observed by Lord Hardwicke, in the year 1754, that the sum of 40*l.* was very low, and that the lowness of it had often been noticed by the Court, and that it had been settled at a time when the costs of the Court did not run to anything like what they did then. From that time, however, the Court never departed from the rule until the new orders were made in 1828, by the 40th of which *orders it is directed, that the penal sum in the bond to be given as a security to answer costs by any plaintiff who is out of the juris- [*38] diction of the Court, shall be increased from 40*l.* to 100*l.* (*b*)

The manner of giving the security is as follows: the plaintiff delivers a note to the defendant's clerk in court containing the name and description of the person intended to become security. This note is sent to the defendant's solicitor, who will return an answer whether he approves the security or not, and if he does not object thereto the bond is consequently given. If he requires two persons to enter into the bond, the plaintiff must comply with this requisition. If the defendant's solicitor objects to the persons offered as security, which it appears he has a right to do, (*c*) the plaintiff must find others, or the persons already offered must justify by affidavit in 200*l.* (*d*)

The bond is given to the two senior six clerks not towards the cause, and is prepared by the plaintiff's solicitor in the following form:

"Know all men by those presents, that we, A. B. of the City of London, merchant, and C. D. of the same place, merchant, are held and firmly bound to and Esqrs., in the penal sum of of good and lawful money of Great Britain: for which payment to be well and faithfully made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals, &c.

"Whereas, L. R., plaintiff, has lately exhibited his bill of complaint in His Majesty's High Court of Chancery against R. S., defendant, touching the matters therein contained. Now the condition of this obligation is such, that if the above bounden A. B. and C. D., or either of them, their heirs, executors or administrators do, and shall well and truly pay or cause to be paid, all such costs as the said Court shall think fit to award to the defendant on the hearing of the said cause or otherwise, *then this obligation to be void, or [*39] else to remain in full force and virtue. (*e*)

"Sealed and delivered, &c."

If there are several defendants, and one only obtains the order, yet the security must be given to answer the costs of all. Originally, where there were several defendants only, one bond was given, which was deposited with one of the six clerks on behalf of all parties. Afterwards, the bond was deposited, not with a six clerk, but with a clerk in court, and as the clerk in court of one

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(*z*) Gage v. Lady Stafford, 2 Ves. 557. (*a*) Ibid.; Ogilvie v. Hearne, 11 Ves. 599.

(*b*) Orders, 2 Russell, App. 17. As no similar order has been made by the Court of Exchequer, the penal sum in the bond to be given as security for costs is still 40*l.*, according to the old practice. 1 Fowler, Ex. Prac. 311.

(*c*) Cliffe v. Wilkinson, 4 Sim. 122. (*d*) Turner & V. 332.

(*e*) From a note to Mr. Beames's Treatise upon Costs, (p. 359, No. 9,) it appears that in Osborne v. Bartlett, the Court of Exchequer held, that where a defendant had become a bankrupt, and his assignees were made parties by supplemental bill, they were entitled to call for a fresh security, because the form of the obligation, although entered into with the officer of the court, is merely to pay the costs of the defendant who is named.

party had no more right to hold the bond than the clerk in court of another party, it became the practice for every clerk in court for a defendant to call for a separate bond; but although it is usual to give a separate bond to each defendant who appears by a separate clerk in court, all the bonds form a security for one sum only. (*f*)

In *Ker* v. *The Duchess of Munster*, (*g*) it is said that the Court of Exchequer refused to allow the plaintiff to pay 40*l.* into Court instead of giving security for that sum, but in *Cliffe* v. *Wilkinson*, (*h*) where the plaintiff offered, instead of giving security, to pay in 100*l.*, pursuant to the new orders, the Vice Chancellor, Sir L. Shadwell, said, that if he would increase the sum offered, so as to bear the expense of bringing the money into Court and getting it out again, he would grant the motion, which he accordingly did by making the order for the payment of 120*l.* into Court. (*i*)

[*40] *SECTION VII.

Of Paupers.

It has been before stated to be a general rule, subject to very few exceptions, that there is no sort or condition of persons but may sue in the Court of Chancery. Amongst the exceptions to this rule those who are in indigent circumstances are not included, and any party, however poor he may be, being in other respects competent, has the same right as another to commence proceedings in the Court of Chancery for the assertion of his claims, and that without being required to give any security for the payment of costs to the opposite party, in case he fails in his suit. Lord Eldon, in *Ogilvie* v. *Hearn*, (*a*) said that the Court would not require security for costs from any man in England, upon any representation of his circumstances, and this liberality seems to be extended to the case of the *prochein amy* of infants; indeed any other rule would amount to a denial of justice to the children of poor persons, who might become entitled to property, and yet be precluded from asserting their right because their father, who is the proper person to be their *prochein amy*, by reason of his circumstances could not be so, without giving security for costs, which he might not be able to procure. (*b*) With respect to the *prochein amy* of a *feme covert;* there is in this respect a great difference in the rule, for it has been held that the *prochein amy* of a married woman must be a person of substance, (*c*) because a married woman and an infant are differently circumstanced, as the infant cannot select his own *prochein amy*, but must rely upon the good offices of those who are nearest to him in connexion, or otherwise his rights might go unasserted, but the married woman has the power of selecting; she is therefore required to select for her *prochein amy* a person who, if her claim should turn out to be unfounded, can pay to the defendant the costs of the proceeding.

It has been said that churchwardens may join in a suit with a poor person-

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(*f*) Lowndes v. Robertson, 4 Mad. 465. In the report of this case the Vice Chancellor, Sir J. Leach, is reported to have said, that it was desirable the old practice should be restored.

(*g*) Bunb. 35. (*h*) 4 Sim. 122.

(*i*) For more on the subject of security for costs, *vide post.* Alien; Bill; Security for Costs.

(*a*) 11 Ves. 600.

(*b*) *Vide* Squirrel v. Squirrel, 2 Dick. 765; and *post.* Infant Plaintiffs.

(*c*) Anon. 1 Atk. 570; *vide post. Femes Covert* Plaintiffs.

who is chargeable to the parish,(d) this must *be upon the principle, that as the person receives his support from the parish, the parish in return have a right to benefit by whatever property the pauper may acquire during the time he is dependant upon them, to reimburse them for the outlay. [*41]

It does not appear, however, that any suit of this description has been instituted at least for a great many years past. Indeed the legislature has provided means by which all persons, who are not worth a sum of 5*l.* beyond the subject-matter in litigation, may be enabled to resort without expense to the ordinary tribunals and the Courts of Equity have adopted the same means into their practice.

By the Statute 11 Hen. 7, c. 12, after reciting, "that where the King our Sovereign Lord of His most gracious disposition, willeth and intendeth indifferent justice to be held and ministered according to his common laws to all his true subjects, as well to the poor as rich, which poor subjects be not of ability ne power to sue according to the laws of this land for the redress of injuries and wrongs to them daily done, as well concerning their persons and their inheritance as other causes," It is enacted, "that every poor person or persons which have or hereafter shall have cause of action or actions against any person or persons within this realm, shall have by the discretion of the Chancellor of this realm for the time being, writ and writs original and writs of subpœna according to the nature of their causes, therefore nothing paying for the seals of the same, nor to any person for the writing of the same writ and writs to be hereafter sued; and that the said Chancellor for the time being shall assign such of the clerks, which shall do and use the making and writing of the same writs, to write the same ready to be sealed, and also learned counsel and attorneys for the same, without any reward taken therefore; and after the said writ or writs be returned, if it be afore the King in his Bench, the justices there shall assign to the same poor person or persons counsel learned by their discretions, which shall give their counsels, nothing taking for the same; and likewise the justices shall appoint attorney and attorneys for the same poor person or persons, and all other officers requisite and necessary to be had for the speed of the said suits to be had and made, which shall do their duties without any reward for their counsels, help and *business in the same; and the same law and order shall be observed and kept of all such suits to be made afore the King's Justices of his Common Pleas and Barons of his Exchequer, and all other Justices in the Courts of Record where any such suit shall be." Under this Statute, the practice of the Courts of Law has been to admit all persons to sue *in forma pauperis*, who could swear that they were not worth 5*l.* after all their debts are paid, except their wearing apparel and the subject-matter of the suit; and the practice of the Courts of Law in this respect has been adopted by Courts of Equity, although persons suing in these Courts do not come within the provisions of the Act of Parliament above referred to. [*42]

The privilege of suing as paupers extends only to persons suing in their own rights, and not to executors or administrators. (e) In a modern case, however, where the party sustained the mixed character of executor and legatee, Lord Eldon held that it formed an exception to the general rule, but to prevent any undue practice in suing *in forma pauperis*, and under colour of that privilege to obtain *dives* costs, his lordship thought that a special order was necessary to enable the pauper to proceed in that character as to the legacy. (f)

(d) 1 Eq. Ca. Ab. 71. (e) Paradice v. Sheppard, 1 Dick. 136.
(f) Thompson v. Thompson, Hil. 1824, cited 1 Turner & Venables, 518.

Persons filling the character of *prochein amy* cannot sue *in forma pauperis*, although, as we have seen before, the poverty of a *prochein amy* of an infant is no ground for dismissing him. (*g*)

It has been held that a bankrupt may be admitted to petition against his commission *in forma pauperis*; (*h*) and where a person was ordered to be examined *pro interesse suo*, respecting a claim set up by her to some lands taken under a sequestration, but was unable from poverty to make out or support her right, liberty was given to her to do so *in forma pauperis*. (*i*)

A plaintiff may be admitted to sue as a pauper upon the usual affidavit, at any time either before or after the commencement of the suit, but in the latter case he will be liable to all the costs incurred before his admission. (*k*)

[*43] *The question whether, after a dismissal of a former suit, a plaintiff can be admitted to sue again for the same matter *in forma pauperis* without paying the costs of the first suit, has been much discussed. In a case in Vernon, (*l*) a plaintiff was permitted to file a bill of review, without payment of the costs of the former suit, amounting to 150*l.*, upon his making oath that he was not worth 40*l.* besides the matter in question in that and another suit between the same parties. That case, however, appears to have been an extreme case, and the instance cited by Lord Eldon in his judgment in *Corbett v. Corbett* (*m*) shows, that Courts of Law, whose decisions are upon this point applicable by analogy to Courts of Equity, would, after judgment of nonsuit against a plaintiff, stay a second action by the same plaintiff suing as a pauper, till the costs of the former action had been paid.

It seems, however, that it is no ground of objection to a party suing *in forma pauperis*, that the suit is a second suit for the same matter as a former suit, in which the plaintiff had likewise sued as a pauper, unless the second suit can be justly characterized as vexatious; (*n*) and in *Corbett* v. *Corbett*, (*o*) Lord Eldon appears to have held, that the circumstance of the plaintiff having conducted himself vexatiously in the first suit would not be a ground for dispaupering him in the second; and that the fact of his having been supplied with money by a charitable subscription, for the purpose of assisting him in the conduct of his suit, although it might afford ground for impeachment at common law, was no ground upon which he could deprive him of the right to sue as a pauper in equity.

In *Taylor* v. *Bouchier*, (*p*) it is stated by Mr. Dickens to have been said that a pauper could not appeal, and that the proposition was assented to by the bar; but in *Bland* v. *Lamb*, (*q*) *Lord Eldon said that it was a very singular proposition, and that he could not see why, because a party was poor, the Court should not set itself right, and made an order that the appellant should be at liberty to prosecute the appeal *in forma pauperis*. (*r*) [*44]

Where pauper plaintiffs are guilty of vexatious conduct in the suit, the Court

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(*g*) Anon. 1 Ves. jun. 410.
(*h*) *Ex parte* Northam, 2 V. & B. 124.
(*i*) James v. Dore, 2 Dick. 788.
(*k*) Anon. Mos. 66. In the Court of Exchequer, parties applying to be admitted to sue or defend *in forma pauperis* after the commencement of the suit, are required to give security by the recognizance of two sureties in 40*l.*, to answer the costs already incurred in the cause, before they can be admitted, and the names and places of abode of the two persons to be named in the recognizance must be previously proposed as sureties by the solicitor for the pauper, to the adverse solicitor for his approbation, 1 Fowler, 429.
(*l*) Fitton v. Earl Macclesfield, 1 Vern. 264.
(*m*) 16 Ves. 410.
(*n*) Wild v. Hobson, 2 Ves. & B. 112.
(*o*) 16 Ves. 407.
(*p*) 2 Dick. 504.
(*q*) 2 Jac. & W. 402.
(*r*) *Vide* Fitton v. Earl Macclesfield, *supra*.

will order them to be dispaupered; and an order to that effect was actually made by the Vice Chancellor upon motion in *Wagner* v. *Mears*. (*s*)

It is also laid down in a book of considerable authority (*t*) that paupers bringing vexatious suits being detected, and the Court informed thereof, they shall not only be dismissed but punished; and in Tidd's Practice (*u*) it is said, that at law if a pauper be nonsuited he shall pay costs or be whipped; but this punishment does not appear to have been ever inflicted.

In *Pearson* v. *Belchier* (*w*) Lord Loughborough said, that a pauper is liable to be committed if he files an improper bill, as otherwise he might be guilty of great oppression.

In order to be admitted to sue *in forma pauperis*, the plaintiff must present a petition to the Master of the Rolls containing a short statement of his case, (and of the proceedings, if any, which have been had in the cause,) and praying to be admitted to sue *in forma pauperis*, and that a counsel and a six clerk may be assigned to him.

This petition must be under-written by a certificate signed by counsel, "that he conceives the plaintiff has just cause to be relieved, touching the matter of the petition for which he had exhibited his bill;" (*x*) and there must also be annexed to the petition an affidavit sworn by the plaintiff before a Master that he is not worth in all the world the sum of 5*l*., after payment of his just debts, his wearing apparel and the matters in question in the cause only excepted. (*y*)

It is to be observed, that this affidavit must be sworn by the party himself; and that in a case in which it afterwards appeared that the affidavit had been sworn by a third person, the party was dispaupered. (*z*)

*The petition after it has been certified, is then with the affidavit annexed, to be presented to the Master of the Rolls, who, if he [*45] sees no cause against it, underwrites an order for the petitioner's admission according to the prayer. (*a*)

This order assigns merely a counsel and six clerk to act for the pauper, and does not appoint any person to be his solicitor; but it is the duty of the six clerk named, to appoint one of the sixty clerks of his office, to conduct, as solicitor, the proceedings on the part of the pauper. (*b*)

After admittance, no fee, profit or reward (except pauper's fees) is to be taken of the pauper by any counsel or attorney for the despatch of business whilst it depends in Court, and he continues *in forma pauperis*; nor shall any contract or agreement be made for any recompense or reward afterwards; and if any person offending herein shall be discovered unto the Court, he shall undergo the displeasure of the Court, and such farther punishment as the Court shall think fit to inflict; and if any pauper offend herein he is to be dispaupered, and never again be admitted in the same suit *in forma pauperis*. (*c*)

If it be made to appear to the Court that any pauper has sold, or contracted for, the benefit of his suit, or any part thereof, while the same is depending, such cause shall be thenceforth wholly dismissed, and never again retained. (*d*) But although the clerks take no fees, strictly so called, of a pauper, yet they may make him pay for the labour of writing, which is after the rate of twopence per sheet. (*e*)

The counsel or attorney assigned by the Court to assist a person *in forma*

(*s*) 3 Sim. 127.
(*u*) Ed. 1817, p. 89.
(*x*) Harr. 437.
(*z*) Wilkinson v. Belcher, 2 Bro. C. C. 272.
(*a*) Har. 389.
(*c*) Ord. Ed. Beam. 218.
(*e*) Har. 389.
(*t*) Harr. 389.
(*w*) 4 Ves. 630.
(*y*) Ib. 389.
(*b*) Lewis v. Kennett, 3 Russ. 466.
(*d*) Ord. Ed. Beam. 216.

pauperis, either to prosecute or defend, may not refuse so to do, unless he satisfies the Court who granted the admittance that he has some good reason for his forbearance. (*f*)

All notices of motions to be made on behalf of a person suing *in forma pauperis* must be signed by the clerk in Court, and the signature of the solicitor will not be sufficient. (*g*)

When the counsel assigned makes a motion on behalf of a pauper he ought [*46] to have the order of admittance with him, *and to make such motion before he makes any other; and if the registrar shall find that the person on whose behalf the motion was made was not admitted *forma pauperis*, he is not, according to the order of the Court, to draw up the next motion made by such counsel, who is to lose the fruit of such motion, in respect of his abuse of the order of the Court. (*h*)

A counsel making a motion on behalf of a person admitted to sue *in forma pauperis*, may afterwards make as many motions as he might have had, if he had not made it. (*i*)

Formerly no process of contempt could be sent to the Great Seal, at the suit of any person prosecuting as plaintiff *in forma pauperis*, until it had been signed by the six clerk who dealt for him, who was to take care that it should not be vexatious or needless; (*k*) but this is now altogether disused, the order of admission however, is usually produced in the office where the pauper has occasion to pass. (*l*)

It is stated in the Practical Register (*m*) that a plaintiff suing *in forma pauperis* shall not amend his bill by leaving out defendants without paying their costs; but upon turning to the case referred to in the margin, (*n*) in support of this dictum, it does not bear out the assertion to the extent to which it is carried in the Register. The case was that of a plaintiff who was admitted to sue *in forma pauperis* after he had filed his bill, and then made an application for leave to amend by striking out some of the defendants, which was objected to on the ground that, having been made parties prior to the plaintiff's admission, they were entitled to their costs up to that time.

In *Pearson* v. *Belchier*, (*o*) it is said that a motion was made on the part of the plaintiff in a pauper cause, to dismiss the bill against two of the defendants without costs; but that the Lord Chancellor ordered it to be made, on payment of costs. It appears, however, from the registrar's book, that the order for [*47] dismissal in that case was drawn up *without costs;* (*p*) *and it is to be observed, that in *Corbett* v. *Corbett*, (*q*) before referred to, the pauper's first bill had many years before been dismissed without costs, before hearing, although the cause had reached that stage, and that, this very circumstance was relied upon as a ground for *dispaupering* him in the second suit, but was not considered as sufficient to induce the Court to make the order. It is also to be observed, that if a cause goes against a pauper at the hearing, he shall not pay costs to the defendant, but he may be punished personally, though such punishment is not very often inflicted. (*r*)

It seems to have been formerly considered, that where a plaintiff sues *in forma pauperis*, and has a decree in his favour with costs, he will only be

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(*f*) Ord. Ed. Beam. 216.
(*g*) Gardiner v. ———, 17 Ves. 387.
(*h*) Ord. Ed. Beam. 217.
(*i*) Curs. Canc. 489.
(*k*) Ord. Ed. Beam. 217.
(*l*) Harr. 390.
(*m*) Ed. Wyatt. 321.
(*n*) Wilkinson v. Belcher, 2 Bro. 272.
(*o*) 3 Bro. C. C. 87.
(*p*) Reg. Lib. 1789, B. fo. 524, entered Pearson v. Wolfe, 3 Bro. C. C. 87, Ed. Belt, n. 1.
(*q*) 16 Ves. 407.
(*r*) Harr. 391.

entitled to such costs as he has been actually out of pocket; and upon this ground, in *Angel* v. *Smith*, (*s*) where a pauper plaintiff had a decree for duty and costs, and the Master had proceeded to tax full costs, upon motion by the defendant that the Master might tax only pauper costs, the Lord Keeper ordered the plaintiff and his solicitor to make oath before the Master, and what they swore they had paid or were to pay, was to be allowed; and in *Denn* v. *Russel*, (*t*) after an order to dismiss upon payment of costs, a defendant who had been admitted *forma pauperis* got the pleadings stamped, and paid counsel and divers other fees, which were allowed by the Master upon taxation, but upon this being brought before Lord Camden, C. and Sir Thomas Sewell, M. R., they were both of opinion that the defendant was entitled only to such fees as he had paid, and what he had disbursed at the time of the order, and no more.

It is to be observed, that the decision in *Angel* v. *Smith*, above referred to, is directly at variance with that of Lord Somers, in *Scatchmer* v. *Foulkard*. (*u*) In that case a bill had been brought *in forma pauperis*, to which the defendant put in a plea and demurrer, which were both overruled, and it was insisted that the plaintiff not having been put to costs, should have none; but Lord Somers, after long debate, and inquiry of all the ancient counsel and clerks, who agreed that *he should have costs, ordered him his costs like [*48] other suitors; for though he is at no costs, or but small costs, yet the counsel and clerks do not give their labour to the defendant, but to the pauper. The same principle appears to have been acted upon by Lord Somers, in *Haulton* v. *Hagre*, (*x*) and was adopted by Lord Loughborough, C., and Lord Alvanly, M. R., in *Wallop* v. *Warburton*. (*y*) In that case a decree had been made, whereby it was ordered, generally, that all parties should be paid their costs out of the estate; but one of the defendants having been admitted to defend *in forma pauperis*, the Master refused to tax her costs in the usual manner, without the particular directions of the Court, which the Lord Chancellor upon motion gave. A motion was subsequently made before the Lord Chancellor and the Master of the Rolls, to discharge the order of the Lord Chancellor, upon which his Lordship said, that he had considered the question very much, and had inquired what the practice was in Courts of Law, and that he had found, that if a plaintiff recovered 5*l.*, he was *ipso facto* dispaupered; that the enabling a party to sue or defend *in forma pauperis* was only to enable him to bring forward his claim in a regular manner; but when that right was ascertained, it was never intended that the party who contended against it should be excused from the costs which, according to the course of the Court, he was liable to pay for resisting a just demand; that this practice might certainly be open to some abuses, but upon principle and practice his Lordship thought the order right, especially as the costs in that case were to come out of the estate, and in this opinion the Master of the Rolls concurred. (*z*) In a subsequent case, before Lord Eldon, (*a*) where a plaintiff sued *in forma pauperis*, and the answer was reported impertinent, the question arose, whether the plaintiff's costs in respect of the impertinence were to be taxed as *dives* costs, when after reviewing the cases before cited, his Lordship said, that the result of all the authorities is, that the Court has a discretion in each case, and that in that case the proper order was that the Master should tax **dives* costs; to be paid into Court, and await the event of the cause in its further [*49]

(*s*) Angell v. Smith, Prec. Cha. 219.
(*t*) 1 Dick. 427.
(*u*) 1 Eq. Ca. Ab. 125.
(*x*) Cited in Angell v. Smith, Prec. Cha. 220.
(*y*) 2 Cox, 409.
(*z*) *Vide* Frost v. Preston. 16 Ves. 160; and Hansard v. Kemeys, 1 Jac. & W. 189.
(*a*) Rattray v. George, 16 Ves. 233.

progress. The order accordingly was made for taxation of *dives* costs, but not for payment.

It was determined as long ago as the time of Tothill, that a pauper must pay the costs of scandal in his answer. (*b*)

As a party may be admitted *in forma pauperis* at any time during the suit, so if at any time it is made to appear to the Court that he is of such ability that he ought not to continue *in forma pauperis*, the Court will dispauper him; (*c*) therefore, where it was shown to the Court that a pauper was in possession of the land in question, the Court ordered him to be dispaupered, though the defendant had a verdict at law, and might take a writ of possession at any time. (*d*)

At common law, if a pauper give notice of trial, and do not proceed, or be otherwise guilty of improper conduct, the Court will order him to be dispaupered; (*e*) and it seems probable that in Courts of Equity, if a party who is admitted to sue *in forma pauperis* were to be guilty of vexatious delays, or to make improper motions, such as not appearing when the cause is called on, or moving to suppress depositions upon groundless objections, he would be dispaupered though the Court always proceeds very tenderly in such points. (*f*)

Where an issue is directed out of Chancery in a pauper's suit, he must be admitted as a pauper in the Court in which the issue is to be tried, or otherwise he cannot proceed in it *in forma pauperis*. (*g*) In a case, however, where the plaintiff, a pauper, claimed as heir at law, and the defendant claimed under a will and deed, which were disputed, the bill was retained, with liberty to the plaintiff to bring an action, and the tenants were ordered to pay the plaintiff 150*l.* to enable him to go to trial. (*h*)

[*50] *CHAPTER III.

PART I.

OF PERSONS WHO ARE ABSOLUTELY DISQUALIFIED FROM SUING IN EQUITY.

SECT. I.—*Of the different sorts of Disqualifications.*

THE general rule that all persons of whatever rank or condition, and whether they have a natural or only political character, are capable of instituting suits in equity, is liable, as has been stated, to a few exceptions. What these exceptions are will be the subject of the present chapter.

The disabilities by which a person may be prevented from suing may be divided into two sorts; namely, such as are absolute, and, during the time they last, effectually deprive the party of the right to assert his claim; and such as are qualified, and merely deprive him of the power of suing without

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(*b*) Rattray v. George, 16 Ves. 232. (*c*) Prac. Reg. 320.
(*d*) Ib. 321, *vide* Spencer v. Bryant, 11 Ves. 49.
(*e*) 1 Tidd. 89. (*f*) Whitelocke v. Baker, 13 Ves. 511.
(*g*) Gibson v. M'Carty, Ca. Temp. Lord Hardwicke, 311.
(*h*) Perishal v. Squire, 1 Dick. 31. As to the admission of parties to defend *in forma pauperis*, vide *post*.

the assistance of some other party to maintain the suit on his behalf. Of the first sort are the disabilities which arise from *Alienage, Outlawry, Attainder, Bankruptcy and Insolvency;* of the second sort are those which arise from *Infancy, Coverture, Idiotcy and Lunacy.*

To the first list of disabilities which disqualify a man from entertaining any suit in his own right, might formerly have been added excommunication and popish recusancy. But these disqualifications no longer exist, the first, except in certain cases, having been abolished by the statute 53 Geo. 3, c. 127, the third section of which Act directs, that in those cases in which excommunication is to continue, no person pronounced or declared excommunicate shall incur any civil penalty or incapacity whatever, save such imprisonment as the Court is thereby authorized to inflict. The disqualification arising from Popish recusancy has been virtually, if not entirely, abolished by the 31 Geo. 3, c. 32, by which Papists and *persons professing the popish religion, taking the oath and subscribing the declarations therein mentioned, [*51] are relieved from most of the penalties and disabilities to which they were then subject.

SECTION II.

Of Aliens.

With respect to aliens in general it is to be observed, that although by the old law no alien, whether friend or enemy, could sue in the King's Courts, yet the necessity of trade has discouraged and gradually done away with the too rigorous restraints and discouragements which formerly existed; and it is now clear, that for a mere personal demand, and alien born, provided he be not an alien enemy, may sue in the Courts of this country.

This rule is clearly recognized in *Ramkissenseat* v. *Barker*, (*a*) where a bill was filed, against executors for an account, by a plaintiff who had been employed by the testator in India as his Banyan or broker, and a plea was put in on the ground that the plaintiff was an alien born and an infidel, not of the Christian faith, and upon a cross bill incapable of being examined upon oath, and therefore disqualified from suing here; the Court overruled the plea without argument, observing, that the plaintiff's was a mere personal demand, and that it was extremely clear that he might bring a bill in this Court. It has been stated, however, that the Court will not protect the copyright of a foreigner; (*b*) this must, however, be considered as applying only to books published by a foreigner abroad, for there seems to be no reason why a foreigner publishing a book in this country should not be entitled to the same protection which the law affords to native authors. The right of an alien to sue in the Courts of this country is, however, confined to cases arising upon personal demands; for an alien may trade and traffic, and buy and sell, and therefore he must be of ability to have personal actions, but he cannot maintain either real *or mixed [*52] actions, (*c*) because an alien, though in amity, is incapable of holding real property. (*d*) An alien merchant may, however, take a lease, for years, of a house for habitation; it must therefore follow that he may maintain a suit respecting it as long as he resides in this country, though if he depart or relinquish the realm, his right to sue respecting it must terminate, as the lease in that

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(*a*) 1 Atk. 51.
(*b*) Delondre v. Shaw, 2 Sim. 237.
(*c*) Co. Litt. 129 b.
(*d*) Ibid. 2 b.

case belongs to the King; (*e*) and so if he die his executors or administrators shall not have it, but the King. An alien, though a merchant, cannot have a lease of lands, meadows or pastures. (*f*)

Although an alien may maintain a suit in this country, yet if one alien sues another upon a contract entered into in a foreign country, it would be contrary to all the principles which guide the courts of one country in deciding upon contracts made in another, to give a greater effect to the contract than it would have by the laws of the country where it took place: therefore, where a French emigrant resident in this country obtained by *duress* securities from another French emigrant for the payment of a demand, alleged to be due from him, under an obligation entered into in France as security for another, and for which, according to the laws of France, his person could not be affected, Lord Loughborough refused to dissolve an injunction which had been obtained to restrain an action at law upon those securities, and intimated a very strong opinion, that when the case came on for hearing he should in all probability set the securities aside. (*g*) Upon the same principle it was held by Lord Hardwicke, that the Court will not grant a writ of *Ne exeat Regno*, where it appears that the transactions between the parties were entered into upon the faith of having justice in the place where they respectively resided, (*h*) though in the [*53] case before him he considered that the parties *did not deal upon any such understanding, and therefore refused to discharge the writ without security.

The same rule is also acted upon by Courts of Law, as in the case of the two Frenchmen mentioned by Lord Thurlow in *De Carriere* v. *De Calonne*. (*i*) The circumstances of that case were these: the parties were both generally resident at Dunkirk, each of them having transactions in England, and there had been between them a suit at Dunkirk, in the course of which judgment was given against one of the parties, from which he appealed to a higher tribunal; but pending that appeal, the other party having come over to this country, the appellant thought proper to follow him hither, and to make an affidavit of debt against him, under which he was arrested: upon a statement of these circumstances to the Court out of which the process issued, the defendant was discharged upon common bail.

But although in the case of foreigners resident abroad entering into engagements in a foreign country, which, by the law of that country do not admit of arrest, the law of England will not allow one party to arrest another, either in an action at common law, or in a suit of equity for a *Ne exeat Regno*; yet if one of the parties is an Englishman, and they were both resident in different countries at the time the contract was entered into, the Court will not discharge a *Ne exeat* obtained by the party resident in this country, against the other who had casually come hither, on the ground that, by the law of the country of which the other was a native, he would be exempt from arrest for a debt of the same nature. (*k*) It is, however, to be observed, that with respect to writs of *Ne exeat Regno*, Lord Northington is distinctly stated to have thought, that this process ought not to be granted between foreigners; (*l*) and in *De Carriere* v. *De Calonne*, (*m*) Lord Thurlow said it is very delicate to interfere as against

(*e*) Ibid.

(*f*) Jews appear formerly to have been considered as alien enemies, but in Wells v. Williams, (1 Lord Raym. 282, cited 1 Atk. 43,) the Court said that the necessity of trade has mollified the too rigorous rules of the old law, in their restraint and discouragement of aliens. A Jew may sue at this day, though heretofore he could not, for they were then looked upon as enemies, but now commerce has taught the world more humanity.

(*g*) Talleyrand v. Boulanger, 3 Ves. 447.

(*h*) Robertson v. Wilkie, Amb. 177.

(*i*) 4 Ves. 599.

(*k*) Flack v. Holm, 1 Jac. & W. 405.

(*l*) 4 Ves. 585.

(*m*) Ubi supra.

foreigners, whose occasions or misfortunes have brought them here, by an application of this writ to them, and that it would be a necessary term that it shall be simply a case of equity, affording no ground to sue at law.

*With respect to *alien enemies*, the law is clearly settled by numerous cases, that an alien enemy not resident here, or resident here without the permission of the Government, cannot institute any suit whatever in this country, whether at law or in equity, either for real or personal property, until both nations be at peace; (*n*) and it is said that the question, whether he is in amity or not, shall be tried by the record, viz: by the production of the proclamation of war. (*o*) It is to be observed, that in declaring war, the King, in his proclamation, usually qualifies it by permitting the subjects of the enemy resident here to continue so long as they peaceably demean themselves, so that without doubt such persons are to be deemed in effect alien friends; (*p*) therefore, where an alien enemy has lived here peaceably a long time, or has come here for refuge and protection, the Court will discountenance pleas of alienage against them. (*q*) It seems also that a prisoner of war may sue upon a contract entered into by him during the time of his captivity; thus where the subject of a neutral state was taken in an act of liability to this country, on board an enemy's fleet, and brought to England as a prisoner of war, it was held that he was not disqualified while in confinement from maintaining a suit entered into by him as a prisoner of war. (*r*) [*54]

The mere circumstance of residing in a foreign country, the Government of which is at war with this country, and of carrying on trade there, is sufficient to constitute any person an alien enemy, even though he would not otherwise be considered in that character. Thus a subject of a neutral state, resident in a hostile state in the character of consul of the neutral state, will, if he carry on trade in the hostile country, be considered as an alien enemy, and disqualified from suing in the courts of this country, although, had he merely resided there in his diplomatic character, he would not have been disqualified; (*s*) and even if a British subject residing in a foreign *state which is at war with this country, carry on trade there without a licence from the Government of this country, his trading will be considered such an adherence to the King's enemies as will incapacitate him from maintaining a suit here; (*t*) and although he be an ambassador or other representative of the Crown residing in a hostile state, yet if he carry on trade in such state without a licence he will deprive himself of the right to sue in the Municipal Courts of this country, because he is lending himself to the purposes of the enemy by furnishing him with resources. (*u*) [*55]

If, however, a subject of this country, residing in a hostile country, have a licence from this Government to trade, he will not incur any disability as long as he confines himself to the trade authorized by such licence; (*x*) but if a person having a licence to reside in an hostile country, and to export corn or other specified articles to this country, were to use such licence beyond its expression, for the purpose of dealing in articles to which it has no relation, he cannot maintain that such dealing is not an enemy's dealing. (*y*)

The disability to maintain a suit on account of alienage extends to all cases

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(*n*) Co. Litt. 129 b.; 6 T. R. 23; 1 Bos. & P. 163; 3 Bos. & P. 113.
(*o*) Harg. & Butler's Co. Litt. 129 b. n. 2. (*p*) Ibid. n. 3.
(*q*) Wyatt's Prac. Reg. 327.
(*r*) Sparenburgh v. Bannatyne, 1 Bos. & P. 163.
(*s*) Albretcht v. Sussman, 2 Ves. & B. 323.
(*t*) M'Connell v. Hector, 3 Bos. & P. 113.
(*u*) *Ex parte* Baglehole, 18 Ves. 529.
(*x*) Ibid. (*y*) Ibid.

in which an alien enemy is interested, although his name does not appear in the transaction; thus, it has been held that an action at law cannot be maintained upon a policy of insurance upon the property of an alien enemy, even though the action is brought in the name of an English agent, (z) and though it is alleged that the alien is indebted to the agent in more money than the value covered by the policy. (a) Where, however, a certain trading of an alien enemy (viz: for specie and goods to be brought from the enemy's country in his ships into our colonial ports) was licenced by the King's authority, it was held that an insurance on the enemy's ship, as well as on the cargo, was in furtherance of the same policy, which allowed the granting of the licences to authorize the trade; and that effect ought, therefore, to be given to the ordinary [*56] means of indemnity, by *which that trade (from the continuance of which the public must be supposed to derive benefit) may be best promoted and secured; the Court of King's Bench therefore determined that an action brought by an English agent to recover the amount of the insurance on the ship, might be maintained notwithstanding the ship belonged to an enemy. It was held, however, that although in such a case the agent might sue, because the King's licence had purged the trust in respect to him of all its injurious consequences to the public interest, yet that it had not the same effect of removing the personal disability of the principal, so as to enable him to sue in his own name. (b)

The disability to sue under which an alien enemy lies is personal, and takes away from the King's enemies the benefit of his Courts, whether for the purpose of immediate relief or of giving assistance in obtaining that relief elsewhere; therefore an alien enemy cannot institute a suit for the purposes of obtaining a discovery, even though he seek no further relief. (c)

It is to be observed, that the right of an alien to maintain a suit relating to a contract, is only suspended by war, if the contract was entered into previously to the commencement of the war, and that it may be enforced upon the restoration of peace. Upon this principle, in bankruptcy, the proof of a debt due to an alien enemy upon a contract made before the war broke out, was admitted, reserving the dividend. (d) But no suit can be sustained to enforce an obligation arising upon a contract entered into with an alien enemy during war, such contract being absolutely void. (e) And where a policy of insurance on behalf of French subjects was entered into just before the commencement of the war, upon which a loss was sustained in consequence of capture by a British ship after hostilities had commenced, the proof of a debt arising from such policy, which had been admitted by the commissioner in bankruptcy, was ordered to be expunged. (f)

[*57] The principle upon which the last-mentioned case was decided, *is fully stated by Lord Ellenborough in *Brandon* v. *Curling*, (g) where it is laid down by his lordship as a rule, that every insurance on alien property by a British subject must be understood with this implied exception, "that it shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured or assurer."

A defence on the ground that the plaintiff is an alien enemy should be made by plea before answer. Thus, where a bill was filed by a plaintiff residing in a foreign country at war with this, for a commission to examine witnesses there, and the defendant put in an answer, an application for an order for the commission was granted, though it was objected that the Court ought not to

(z) Bristow v. Towers, 6 T. R. 35.
(b) Kensington v. Inglis, 8 East. 273.
(d) *Ex parte* Boussmaker, 13 Ves. 71.
(f) *Ex parte* Lee, 13 Ves. 64.
(a) Brandon v. Nesbitt, ibid. 23.
(c) Daubigny v. Davallon, 2 Anst. 462.
(e) Ibid.
(g) 4 East 410.

grant a commission to an enemy's country, the Court being, as it seems, of opinion that the objection had come too late. (*h*)

It does not appear from any case in the books, what would be the effect of a war breaking out between the country of the plaintiff and this country, after the commencement of the suit, but from analogy to what is stated by Lord Chief Baron Gilbert to be the practice of the Court with regard to outlawry, namely, that if it is not pleaded it may be shown to the Court on the hearing, as a peremptory matter against the plaintiff's demands, because it shows the right to the thing to be in the King, (*i*) it is probable that the Court would, under such circumstances, stay the proceedings.

It appears to be the essence of a plea that the plaintiff is an alien enemy, to state that the plaintiff was born out of the liegance of the King, and within the liegance of a state at war with us; but where the plea contains words which amount in substance to an allegation of these facts, it will be sufficient, although they are not averred with the same strictness that is required by the rules of law. Thus, where a plea averred that the plaintiffs were *Frenchmen, aliens and enemies of the King*, the Court held that the plea was sufficient, the word *alien* being a legal term, importing born out of the liegance of the King, and within the liegance of some other state; and the *words, Frenchman and enemies to the King, showing that they were the [*58] subjects of a state at war with this country. (*k*)

It is to be observed that the Courts here take notice, without proof of a war in which this country is engaged, but a war between foreign countries must be proved. (*l*)

In all cases of a person who is permitted to sue in equity, whether an alien or natural born subject, if he states himself in his bill to be *resident* abroad, or if it comes to the knowledge of the defendant that he is actually so, the defendant may obtain an order of the Court that the plaintiff shall, before he proceeds further, give security to answer to the defendant the costs of the suit. (*m*) And so if he comes in as a petitioner in any stage of the cause, he must, in like manner if called upon, give security. Thus, in *Drever* v. *Maudesley* (*n*) where a foreigner, who claimed to be a creditor of the testator in the cause, petitioned, after the Master had made his report, to have his claim referred to the Master, the Court made the order, but upon condition of his giving security for costs. He must, however, appear to be actually resident abroad. (*o*) The mere circumstance of his only being about to go abroad will not be sufficient, as he may return: (*p*) but where the bill described the plaintiff as being confined in the prison of Coldbath Fields, under an order from the Secretary of State, preparatory to his being removed from this country under the Alien Act, Lord Thurlow, upon motion after appearance and before answer, made an order that he should give security for costs. In a subsequent cause (*q*) his lordship said that he had made that order on the ground that if the plaintiff were sent abroad under the Alien Act, he could not return; and that it was therefore different from the ordinary case of a plaintiff merely going abroad, as in such case he may return before the cause is heard. (*r*)

(*h*) Cahill v. Shepherd, 12 Ves. 335. (*i*) Gilb. For. Rom. 53.
(*k*) Daubigny v. Davallon, 2 Anst. 462.
(*l*) Dolder v. Lord Huntingford, 11 Ves. 292.
(*m*) Meliorucchy v. Meliorucchy, 2 Ves. 24.
(*n*) 5 Russ. 11.
(*o*) Green v. Charnoch, 1 Ves. J. 396; Hoby v. Hitchcock, 5 Ves. 699.
(*p*) For more upon the subject of security for costs, see *ante*, p. 33.
(*q*) Seilaz v. Hanson, 5 Ves. 261. (*r*) Hoby v. Hitchcock, 5 Ves. 699.

[*59] *SECTION III.

Persons outlawed in Civil Actions.

BESIDES the disabilities arising from alienage, there are others which may prevent a person from maintaining a suit in the courts of this country as long as such disabilities last. The first of these which shall be noticed is outlawry in a civil suit. "An outlaw," says Littleton, "is out of the law to sue an action during the time that he is outlawed;" (*a*) and all persons may take advantage of the disability. (*b*) The maxim "*frustra legis auxilium implorat qui in legem committit*," comprises both the reason and the justice on which this disability stands. "*Justum est enim judicium*," says Bracton, "*quod sine lege et judicio pereat qui secundum legem vivere recusat.*" (*c*)

It seems, however, that an outlawry in an action at law will not disqualify the party outlawed from suing in equity for relief from his liability at law in such action; (*d*) thus if a bill be for relief against an action at law, and outlawry be pleaded by the defendant in the same cause, it is a bad plea, because the outlawry is part of the grievance, and it is *exceptio ejusdem rei cujus petitur dissolutio.* (*e*)

Outlawry in an executor or in a *prochein amy* is no disqualification, because they do not claim in their own right, the real plaintiff being the testator or infant; and the outlawry of any third person is no exception against him why he should not be admitted to sue; (*f*) and so where a husband and wife sue as administrators, outlawry in the husband is no disqualification. It is stated, however, that outlawry in the plaintiff's testator, where the action is brought by an executor, is a good plea at law, (*g*) although an executor or administrator cannot plead such outlawry in his testator. (*h*) The outlawry of a mayor [*60] is not a good plea to an action at law by the mayor and *commonalty; and it seems that such a plea would not prevail in equity. (*i*) Lord Redesdale lays it down that outlawry in the relator of an information constitutes no objection to him, (*k*) though from the decision in *Attorney General* v. *Heath*, before referred to, (*l*) the contrary would appear to be law; but in that case it is to be observed that the relator sustained the character of plaintiff as well as relator, and was interested in the subject of the dispute, and the plea was in substance a plea of outlawry in the plaintiff himself. (*m*)

It seems that outlawry in Chester or Durham cannot be pleaded in disability of a plaintiff suing in one of the Courts at Westminster; and though this appears to be laid down with reference to Courts of Record, it seems equally applicable to the superior Courts of Equity. A different rule, however, is stated to prevail as to outlawry in the Courts of the county palatine and duchy of Lancaster, which it is said may be pleaded in disability of a plaintiff suing in a superior Court at Westminster. (*n*)

(*a*) Co. Litt. 128 a.
(*b*) Ibid.
(*c*) Beames on Pleas, 100.
(*d*) Ord. in Chan. (Ed. Beames) 175 n. 40.
(*e*) Jenk. Cent. 37; Gilb. For. Rem. 54.
(*f*) Gilb. For. Rem. 54; Arnold v. Arnold, Toth. 76: Killigrew v. Killigrew, 1 Vern. 184; Swan v. Porter, Hardr. 60.
(*g*) Lut. 1604.
(*h*) Beames on Pleas, 103, n.; Com. Dig. Abatement, E. 2.
(*i*) Beames on Pleas, 104.
(*k*) Lord Red. 184.
(*l*) *Ante*, p. 16.
(*m*) Lord Red. 186.
(*n*) Beames on Pleas, 104, 105.

The proper way in which to take advantage of the outlawry of a plaintiff, appears to be by plea *ante litem contestatam*, that is, before answer, for after answer the defendant admits the plaintiff to be a proper person to be answered to; and therefore such plea would then come too late; but it is said that if an outlawry be not pleaded, yet it may be shown at the hearing as a peremptory matter against the plaintiff's demands, if it be personal, because it shows the right to the thing in demand to be in the King. (*o*)

In a case where upon an amended bill the defendant had procured an order for six weeks' time to answer, instead of the usual order for "time to plead answer and demur, not demurring alone," and afterwards ascertained that the plaintiff had been outlawed, and therefore moved that notwithstanding the order for time to answer he might be at liberty to plead the outlawry in bar to the plaintiff's suit, on the ground that the order had been inconsiderately obtained, and ought to have been the usual order; and that at the time it was made the *defendant's solicitor was ignorant of the outlawry, the Court refused the motion. (*p*) [*61]

It has been determined, however, that a defendant against whom an attachment has been issued for want of an answer, may file a plea of outlawry. (*q*)

In a plea of outlawry, the record of outlawry or the *capias* thereupon must be pleaded *sub pede sigilli*, and is usually annexed to the plea; (*r*) and the defendant may show as many outlawries as he can. (*s*)

In *Dalton* v. *Beavan* (*t*) the defendant pleaded that the plaintiff was an outlaw, and annexed to his plea a copy of the record of the proceedings in the outlawry, and it was contended on behalf of the plaintiff that the proceedings as set out in the plea were irregular, and in violation of the late Act of Parliament called the Uniformity of Process Act; and that as the defect appeared on the plea itself, the Court was bound to take notice of it, and to treat the outlawry as of no force, but the Master of the Rolls (Sir C. Pepys) said that the Uniformity of Process Act was merely directory, and did not go to declare that any defect or omission in this respect should render the proceedings void. At all events his Honor was of opinion that as the outlawry pleaded was the judgment of a competent tribunal, so long as it remained on the records of that tribunal unreversed, the Court was bound to presume that it was regular and valid.

If a plaintiff thinks a plea of outlawry insufficient through mispleading or otherwise, he may, upon notice to the clerk in court on the other side, set it down with the registrar to be debated with the rest of the pleas and demurrers in Court; (*u*) but if the plaintiff shall not in such case enter it with the registrar within eight days after the same shall be filed, the defendant may take out process against the plaintiff for his ordinary costs (of five pounds) as if the same had been heard. (*x*)

If the plea of outlawry is resorted to "in any suit for that duty touching which relief is sought by the bill, it is insufficient, *according to the rule of law, and shall be disallowed of course, as put in for delay, and the plaintiff may, notwithstanding such plea, take out process to enforce the defendant to make a better answer, and pay five marks costs, otherwise a plea of outlawry is always a good plea, so long as the outlawry remaineth in force, and therefore the defendant shall not be put to set it down with the registrar." (*y*) [*62]

(*o*) Gilb. For. Rem. 53.
(*p*) Philips v. Gibbons, 1 Ves. & B. 184.
(*q*) Waters v. Chambers, 1 S. & S. 225.
(*r*) Tothill. 54.
(*s*) Curs. Can. 185.
(*t*) Rolls, March 5, 1835.
(*u*) Curs. Can. 185.
(*x*) Ord. in Chan. (Ed. Beames) 175.
(*y*) Ord. in Chan. (Ed. Beames) 175.

If on argument the plea is allowed the plaintiff pays five pounds costs; (z) but if commissioner in the country send up a plea of outlawry in disability, the defendant shall have no costs, although the plea be allowed, for it might have been put in without such commission, and the plaintiff was put to an unnecessary charge for attending such commission. (a)

From this it is evident that a plea of outlawry need not be put in upon oath, because if an oath were required, attendance before the commissioner would be necessary. It is, however, to be observed, that by the short note of a case which occurs in 2 Vern. (b) it is stated that a plea of outlawry was over-ruled because it was not put in upon oath. It does not appear from the report, upon what ground this point was determined; but it is presumed that it must have been on the ground that such oath was necessary to support the averment in the plea that the plaintiff was the same person, because it is quite clear that in pleas of matters of record the seal of the Court is sufficient testimony of the truth. In a subsequent case in the same volume, (c) it appears that a reference was made to the six clerks, whether by the course of the Court a plea of outlawry, with averment of the same person, ought to be upon oath; and it was stated that in Lord North's time it was ruled that it might be without oath, because it might come in on the other side to aver that he was not the same person. Whereupon the Court, as it was only the common averment of identity of person, allowed the plea to be good without oath; (d) and this seems to be in accordance with Lord Bacon's order. (e)

[*63] With respect to proceeding after an outlawry has been *reversed, Lord Clarendon's order says, that after outlawry reversed, the defendant on a new subpœna served on him, and payment unto him of twenty shillings costs, shall answer the same bill as if such outlawry had not been. (f) From this it appears that under such circumstances the suit may be proceeded in by serving a new subpœna, without filing a bill of revivor; but Lord Chief Baron Gilbert says, that in such a case a bill of revivor must be filed, because the suit being abated, the plaintiff has no day in Court; and it is apprehended that such must be the course of proceeding, because the plea of outlawry is part of the record; and the judgment upon it, which is also on the record, shows that the Court considered the matter alleged in the plea a good reason why the defendant should not be called upon to answer the plaintiff's bill. If the suit is to be proceeded with after such a judgment, there must be some entry on the record to show that the ground upon which the Court gave its judgment has been removed, otherwise the subsequent proceedings would be erroneous, and there seems no other form in which this can be shown than by bill of revivor, as suggested by Lord Chief Baron Gilbert.

SECTION IV.

Persons attainted or convicted.

After judgment in a prosecution for treason or felony, the criminal is said to be *attainted*, *attinctus* or blackened. He is no longer of any credit or reputation, he cannot be a witness in any court, neither is he capable of performing the functions of another, for, by anticipation of his punishment, he is already

(z) 1 Newl. 121.
(a) Gilb. For. Rem. 93.
(b) Parrot v. Bowden, 2 Vern. 37.
(c) Took v. Took, 2 Vern. 198.
(d) *Vide* acc. Pratt v. Taylor, 1 Ch. Ca. 237; Freem. 143. S. C.
(e) Ord. in Ch. (Ed. Beames) 26, 27.
(f) Ord. (Ed. Beames) 175.

dead in law, (a) consequently he is incapable of maintaining a suit in any court of justice, either civil or criminal, unless for the purpose of procuring a reversal of his attainder. (b) It is also to be observed, that the consequences of *attainder are, forfeiture of all the party's property, [*64] real and personal, and disqualification from holding any which he may in future acquire either by descent, purchase or contract. (c) So that even if he had the power of suing it would be useless, as he has no power of retaining what he sues for, even should he succeed, the right to the property in such cases being in the Crown.

With respect to the forfeiture of real estates by attainder, there is a distinction between attainders for treason and for felony. By attainder for treason a man forfeits to the King all his lands and tenements of inheritance, whether fee simple or fee tail, and all his rights of entry in lands or tenements which he had at the time of the offence committed, or at any time afterwards, to be for ever vested in the Crown, and also the profits of all lands and tenements which he had in his own right, for life or years, so long as such interest shall subsist; (d) but with respect to attainder for felony, the 54 Geo. 3, c. 145, enacts, that except in cases of high treason, petit treason, and murder or abetting the same, no attainder shall extend to the disinheriting any heir, nor to the prejudice of the right or title of any person except the offender during his life only; and upon the death of the offender every person to whom the right or interest of any lands or tenements, should or might after the death of such offender have appertained, if no such attainder had been, may enter thereupon. (e)

The forfeiture of real estate consequent upon attainder of treason or felony, relates backwards to the time of the treason or felony committed, so as to avoid all intermediate sales or incumbrances, but not those before the fact. (f) The case is, however, different with regard to the forfeiture of goods and chattels, for that has no relation backwards, so that those only which a man has at the time of conviction shall be forfeited. (g) But by attainder, not only [*65] *all the personal property and rights of action which a man actually has is forfeited; but all personal property and rights of action, which accrue to the offender after attainder, are forfeited and vested in the Crown without office found; so that it has been held that attainder may be well pleaded in bar to an action on a bill of exchange endorsed to the plaintiff after his attainder. (h) There is another distinction between the forfeiture of real and of personal estate—lands are forfeited upon *attainder*, and not before; goods and chattels are forfeited upon *conviction*, because in many of the cases where goods are forfeited there never is any attainder, which happens only where judgment of death or outlawry is given; and being necessarily upon conviction in those, it is so ordered in all other cases. (i) In outlawries for treason or felony, lands are forfeited only by *judgment*, but goods and chattels are forfeited by a man's being put in the *exigent*, without staying till he is *quinto exactus* or finally outlawed, for the secreting himself so long from justice is construed into a flight in law. (j)

These points, although they do not immediately relate to the personal disqualification from suing under which a party lies who has been attainted either

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(a) 4 Bl. Com. 381.
(b) *Ex parte* Bullock, 14 Ves. 452.
(c) Bullock v. Dodds, 2 Barn. & Ald. 277.
(d) 4 Bl. Com. 381.
(e) All copyhold estates are forfeited to the lord and not to the King, unless there be an Act of Parliament or an express custom to the contrary, (1 Cruise's Dig. 361); and the forfeiture in such case does not accrue upon mere conviction, but only on complete attainder, (3 B. & Ald. 510, 2 Vent. 38) unless by special custom to the contrary.
(f) 4 Bl. Com. 381.
(g) Ibid. 387.
(h) Bullock v. Dodds, 2 B. & Ald. 258.
(i) 4 Bl. Com. 387.
(j) Ibid.

of treason or felony, are nevertheless necessary to be adverted to, because if a party claiming a title to property under an attainted person were to institute proceedings in a court of justice relating to that property, his claim might be met by pleading the attainder of the person from whom his claim was derived; (*k*) and in such case the time when the forfeiture accrued may be a very important point for consideration.

Attainder and conviction, like outlawry, must be taken advantage of by plea. Lord Redesdale says, that such a plea is very rare, and that it would be judged with the same strictness as if it were a plea at law. (*l*) In *Burt* v. *Brown* (*m*) an instance of a plea of conviction for manslaughter appears to have occurred, and the plea was overruled on the ground that the part of the body on which [*66] the wound was inflicted was *not sufficiently described, and because it was averred that the offender was tried at the Galloway assizes, without saying that the persons who tried him had a commission of *goal delivery* or were justices of *oyer and terminer*.

It may be observed here, that in order to bar a plaintiff's suit, it is not always necessary to show an attainder or conviction; for if a plea goes to show that in consequence of an offence committed no title ever vested in the plaintiff, conviction of the offence is not essential to the plea. Thus, in the Exchequer, to a bill seeking the discovery of the owners of a ship captured, and payment of ransom, the defendant pleaded that the owner was a natural-born subject, and the capture an act of piracy; and though the Barons at first thought that the plea could not be supported unless the plaintiff had been convicted of piracy, and the record of the conviction had been annexed to the plea, they were finally of opinion that as the plea showed the capture was not legal, and that therefore no title had ever been in the plaintiff, the plea was good. (*n*)

Where a judgment pronounced upon a conviction for treason or felony is falsified or reversed, all former proceedings are absolutely set aside, and the party stands as if he had never been accused, and is restored in his credit, his capacity, his blood, and his estates: with regard to which last, it is said, that though they be granted away by the Crown, yet the owner may enter upon the grantee with as little ceremony as he might enter upon a disseisor. (*o*) From this it follows of course that he may, if he is entitled to equitable relief, sue for it in a Court of Equity, in the same manner that he might have done if no attainder had taken place.

The only other way in which the disqualification arising from an attainder or conviction may be obviated, is by the King's pardon. This formerly could only have been granted under the Great Seal; but now, by 6 Geo. 4, c. 25, s. 1, a warrant under the Royal sign manuel, countersigned by one of the Principal Secretaries of State, granting a free pardon, and the prisoner's discharge [*67] under it; or granting a conditional *pardon, and the performance of such condition, is as effectual as a pardon under the Great Seal.

There is a great difference between the effect of a pardon and of a reversal. In the case of the reversal of an attainder, the party is, as we have seen, in all respects replaced in the same condition that he was in before the commencement of the proceedings, and he is restored to his former credit and capacity; but the effect of a pardon is not so much to restore his former, as to give him a new credit and capacity. (*p*) Thus a person, who has been convicted and pardoned, cannot sue upon any right accrued to him before his pardon, although he may for a right accrued afterwards. (*q*)

(*k*) Lord Red. 189.
(*l*) Ibid. 186.
(*m*) 2 Atk. 399.
(*n*) Fall v. ——, May 1782, Lord Red. 190.
(*o*) 4 Bl. Com. 393.
(*p*) 4 Bl. Com. 402.
(*q*) 1 Com. Dig. Abatement (E.) 3.

With respect to pardons it is to be observed, that where they are conditional the effect of the attainder is not removed till the condition has been performed; therefore, where a man who had been attainted of felony, but pardoned under the 8 Geo. 3, c. 15, on condition of his being transported to New South Wales, returned to England before the expiration of the period for which he was transported, and commenced an action here for a demand accrued since his return, to which the defendant pleaded the conviction and judgment in bar; it was held by the Court of King's Bench, that the mere fact of transportation did not amount to an actual pardon, under the statute 8 Geo. 3, c. 15, and that it was necessary not only that the offender should be transported, but that he should remain in the place to which he was sent during the time for which he was ordered to be transported, before he could be restored to his civil rights. (*r*) Upon the authority of the above case, Sir J. Leach held that personal property which did not belong to a felon at the time of his conviction, but which accrued to him afterwards during the time of his transportation, was forfeited to the Crown. (*s*)

It is to be observed, that in the case of *Bullock* v. *Dodds* above referred to the plaintiff had returned on the faith of an instrument under the seal of the territory of New South *Wales, by which the governor had remitted [*68] the remainder of the plaintiff's sentence, under the authority of the 30 Geo. 3, c. 47, (by which His Majesty was empowered to authorize the governor or lieutenant-governor of any place to which convicts are transported, to remit either absolutely or conditionally the whole or any part of their term of transportation, which remission was to be of the same effect as if His Majesty had signified his intention of mercy under the sign manual, &c.): but the Court were of opinion, that the effect of the remission of sentence by the governor merely placed the party in the situation in which he would have been in case he had received a warrant for a pardon under the privy seal or sign manual, which before the 6 Geo. 4, c. 25, s. 1, could not be pleaded as a pardon. (*t*) In consequence of this decision it has been enacted by the 5 Geo. 4, c. 84, s. 26, that a felon under sentence or order of transportation, receiving a remission of the sentence from the governor or lieutenant-governor of New South Wales, or any other colony, who may be authorized to grant the same, while such felon shall reside in a place in which he lawfully may reside, under such sentence, order or remission, may sue for the recovery of any property acquired by him since his conviction, or for any damage or injury sustained.

SECTION V.

Of Bankrupts and Insolvent Debtors.

The disability to maintain a suit on account of alienage, outlawry and attainder, arises partly from the plaintiff being personally disqualified, and partly from his not being capable of holding the property which is the object of the suit. The disability accruing from bankruptcy arises from the latter cause only, or rather from the fact that by the bankruptcy, all the bankrupt's property, whether in possession or action, is vested in his assignees, (*a*) and a bankrupt,

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(*r*) Bullock v. Dodds, 2 B. & Ald. 258. (*s*) Roberts v. Walker, 1 Russ. & M. 752.
(*t*) 4 Bl. Com. 400; Gully's Case; Leach's Cr. Law. 99.
(*a*) Under the old bankrupt law, as embodied in 6 Geo. 4, c. 19, ss. 63, 64, the Commissioners were directed to convey to the assignees all present estate of the bankrupt, whether

[*69] even though uncertificated, *is not personally disqualified from suing; and may in many cases sustain suits either at law or in equity.

Thus, under the old bankrupt law, if a bankrupt disputed his liability to the commission, or the validity of the adjudication under it, he might maintain trespass against his assignees, (*b*) or trover for his books and papers; (*c*) and it has been held that where assignees have employed the bankrupt in carrying on his trade or manufacture for the benefit of the estate, and paid him money from time to time, it is evidence of such a contract between him and the assignees as will enable him to maintain an action against them for a compensation for his work and labour. (*d*) And so, as a bankrupt, though uncertificated, can acquire and hold property against every one except his assignees, he can maintain an action of *assumpsit* against a third person for his own work and labour performed, (*e*) and for money lent or advanced (*f*) since the issuing of the commission or fiat; and where no claim is made by the assignees, he may also maintain trover for goods acquired after his bankruptcy, (*g*) as well as trespass *quare clausum fregit*, for a trespass committed before his bankruptcy; (*h*) for the defendant in any of these actions cannot object to the bankrupt's claim unless his assignees interfere, and the bankrupt in fact sues at law as a trustee for his assignees. (*i*)

In equity also, a bankrupt who has not obtained his certificate and is sued at law upon a bond or note, is entitled to file a bill of discovery in order to obtain proof that such bond or note was fraudulently procured; and where persons claiming to be creditors of bankrupts, instead of seeking relief under the commission, [*70] *brought an action against the bankrupts, and the bankrupts filed a bill seeking a discovery in aid of their action, and praying that the accounts between them and the plaintiffs at law might be taken, and that the plaintiffs at law might pay the balance which upon taking such accounts might appear to be due from them, a plea of bankruptcy was overruled, the Vice Chancellor (Sir Thomas Plumer) being of opinion, that the bankrupts were entitled to the discovery and account, although they were not entitled to that part of the prayer which sought the payment to them of the balance. (*j*) And where a bill was filed in the Court of Exchequer by an uncertificated bankrupt to which the assignees were not parties, and it appeared that they had failed in an ejectment brought by them to recover the premises in question, in consequence of their not being able to prove the petitioning creditor's debt, the Court retained the bill till proper parties should be added if necessary: the plaintiff paying the costs of the day. (*k*)

In general, however, a bankrupt, although he is by law entitled to the surplus of his estate which remains after payment of his debts, cannot bring a bill in equity for any property which is vested in his assignees under the commission,

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real or personal, and all future property which he might acquire previously to his obtaining his certificate; but now, by the Bankrupt Court Act, 1 & 2 Will. 4, c. 56, ss. 25, 26, all the real and personal property of the bankrupt vest in his assignees by virtue of their appointment.

(*b*) Perkin v. Proctor, 2 Wils. 382.

(*c*) Summersett v. Jarvis, 6 Moore, 56; 3 B. & B. 2, S. C.

(*d*) Coles v. Barrow, 4 Taunt. 754.

(*e*) Chippendale v. Tomlinson, 1 C. B. L.; Silk v. Osborne, 2 Esp. 140.

(*f*) Evans v. Brown, 1 Esp. 170.

(*g*) Fowler v. Down, 1 Bos. & P. 44; Laroche v. Wakeman, Peake 140; Webb v. Ward, 7 T. R. 296; Webb v. Fox, 7 T. R. 391;

(*h*) Clarke v. Calvert, 3 Moore, 96.

(*i*) Cumming v. Roebuck, 1 Holt 172; 1 Deacon's Bankrupt Laws, 555.

(*j*) Lowndes v. Taylor, 1 Mad. 423. This decision was afterwards affirmed on appeal, ibid. 425; 2 Rose 432.

(*k*) Govet v. Armitage, 2 Anst. 412.

even though there may be collusion between them and the persons possessed of the property; (*l*) thus, where a bill was filed by a bankrupt to recover property due to his estate, stating that the commission against him was invalid, and that there was a combination between his assignees and the debtor, to which a demurrer was put in, the Vice Chancellor (Sir J. Leach) allowed the demurrer, saying that if it had been true that the commission was invalid, the plaintiff ought to have tried its validity by an action, and could not by bill impeach the commission, and that if there were a combination between the debtor and his assignees, his proper course was to apply by petition to have the assignees removed and new assignees appointed. (*m*)

*In *Spragg* v. *Binkes*, (*n*) it was held by Lord Alvanley, M. R., [*71] that a bankrupt cannot file a bill for the redemption of a mortgage in respect of his right to the surplus of his estate; and in *Benfield* v. *Solomons*, (*o*) a demurrer was allowed to a bill by a bankrupt against a mortgagee of estates in *England* and *Berbice*, for an account and payment of the balance to the assignees, who were made defendants and charged with collusion.

The principle upon which these decisions are founded appears to be, that although the bankrupt is entitled to an account of the surplus of his estate, yet "as the theory of bankruptcy is, that the party is a bankrupt, because he cannot pay his debts; the *primâ facie* intendment, therefore, is, that he has no property", (*p*) all that he has is a mere right to an account from his assignees; but the presumption being that there is not enough for the creditors, he is not considered as having such an interest in the property sought as will entitle him to maintain a suit respecting it; so that *primâ facie* the bankrupt has no demands. If, however, he states upon petition in bankruptcy that the apparent incumbrances upon his property are not substantial charges, and that the assignees are prevented by the creditors from interfering, or, if the creditors would permit them, refuse; or if both refuse to interfere and give him the chance of a surplus, the Court will say, with reference to the circumstance that the bankrupt cannot sue, the law supposing that he has no interest in the property; yet that is not to be acted upon to the effecting of gross injustice. Therefore if he can give security for costs, the Lord Chancellor [or Court of Bankruptcy] will order the assignees to permit him to use their names, to enable him to recover the property, upon his indemnifying them. (*q*)

As a bankrupt cannot file a bill against strangers respecting property vested in his assignees under the commission, so it has been held that he cannot maintain a suit against his assignees for an account of their receipts and payments under the bankruptcy, and for payment of the surplus. This doctrine *was clearly laid down by Lord Eldon in *Saxton* v. *Davis*, (*r*) and has [*72] recently undergone considerable discussion, in a case before Lord Abinger, C. B., (*s*) in which, after a very full argument, it was decided that in general the rule above laid down, that a bankrupt cannot file a bill against his assignees for an account of their dealings under the bankruptcy, applies as well to an uncertificated bankrupt as to one who has obtained his certificate. In that case the bill had been filed against the purchaser of an estate of the bank-

(*s*) Tarleton *v.* Hornby, 1 Younge & Collyer, 17.

(*l*) An assignment under a commission of bankrupt does not pass property belonging to the bankrupt as factor, executor or trustee. *Vide* Cook's B. L., ch. viii, s. 15, 16, 17; *vide etiam*, 1 Deacon's B. L., c. ix, s. 10, 222.

(*m*) Hammond v. Attwood, 3 Mad. 158. (*n*) 5 Ves. 587.

(*o*) 9 Ves. 77. (*p*) 9 Ves. 86.

(*q*) *Per* Lord Eldon in Benfield *v.* Solomons, 9, Ves. 84; *vide etiam* Spragg *v.* Binkes, *supra*.

(*r*) 18 Ves. 72.

rupt, which had been sold under the commission, for the purpose of overturning the sale, and proceeded on the ground of fraud and collusion between the purchaser and the assignees, which were charged in the bill. The bill also contained an allegation that all the debts proved under the commission had been paid out of the plaintiff's effects, and that after payment thereof there remained in the hands of the assignees a large balance or surplus, and it prayed that the assignees might account for what they had received and expended under the commission, and pay the surplus to plaintiff, &c., and that the sale of the estate might be declared fraudulent and void as against the plaintiff, and that the purchaser might account to him for the rents, profits and produce.

To this bill one of the assignees demurred, and the demurrer was allowed, Lord Abinger being clearly of opinion, that as far as regarded the assignee who had demurred, supposing the case to have stood only on the question of filing the bill against the assignees, the bill could not be sustained. His Lordship, however, said, that the point which gave him the greatest difficulty was, whether independently of any question of account the assignees might not still be made to answer, on the ground that the combination charged between the purchaser and the assignees raised a question which could not be disposed of on demurrer; he was, however, ultimately of opinion that supposing the suit had been for the sole purpose of avoiding the sale, the relief prayed against the purchaser did not require the assignees to be joined in the suit, and therefore, upon [*73] the ground that a bankrupt uncertificated cannot *be allowed to call upon his assignees for a general account of all their transactions, which he might have by applying to the Court of Bankruptcy, and on the ground that the relief sought against the other defendant did not in the least, either of necessity or in any respect of convenience, require the assignees to be joined in the suit, he allowed the demurrer.

It is to be observed, that whatever property a bankrupt has, or, to use a technical expression, *may depart with*, becomes, upon bankruptcy, the property of the assignees, who are to have it for the benefit of the creditors; and the circumstance of such property being in a foreign country where the bankrupt laws of this country do not prevail, makes no difference; so that a bankrupt cannot maintain a suit in this country, even though the property in respect of which the suit is instituted is in another country. This principle is laid down with regard to personal property in a great many cases, (*t*) and has been recognized as applicable to real estates in Scotland and the colonies. In *Cleve* v. *Mills*, (*u*) it was said by Lord Mansfield that although the statutes of bankruptcy don ot extend to the colonies, yet that the assignment under the commission is in the Courts abroad considered voluntary, and as such takes effect between the assignees and the bankrupt, although it does not effect the rights of other creditors. Upon the same principle it is that a great number of estates in Scotland and the colonies have been sold under commissions of bankruptcy in England, and upon this ground the Court refused to entertain a bill by a bankrupt against the mortgagee of an estate in Berbice, for an account, because, although the estate was in a country to which the bankrupt laws did not extend, the disposition of that property was nevertheless in the assignees here, and by the intendment of the law the bankrupt had no interest in the property which entitled him to sue. (*x*)

All doubt upon this point, however, has been set at rest, by the 6 Geo. 4, c. 16, s. 64, by which it is directed that the conveyance to be executed by the

(*t*) Sill *v.* Worswick, 1 H. Bl. 665; Hunter *v.* Potts, 4 T. R. 182; and Phillips *v.* Hunter, 2 H. B. 402.

(*u*) Cooke's Bankrupt Laws, 297.

(*x*) Benfield *v.* Solomons, 9 Ves. 77.

commissioners to the assignees shall be of all lands, tenements and hereditaments (except *copyhold or customary) in England, *Scotland, Ireland, or in any of the dominions, plantations or colonies belonging to His Majesty*, to which any bankrupt is entitled, &c., with a proviso whereby it is directed that where according to the laws of any such plantation or colony such deed would require registration, enrollment or recording, the same shall be so registered, enrolled or recorded according to the laws of such plantation or colony; and no such deed shall invalidate the title of any purchaser for valuable consideration prior to such registration, enrollment or recording, without notice that such commission has issued. And by the Bankruptcy Court Act, 1 & 2 Will. 4, c. 56, s. 26, it is declared, that all the present and future real estate of any bankrupt, whether in the United Kingdom of Great Britain and Ireland, or in any of the dominions, plantations or colonies belonging to His Majesty, which by the above Act is directed to be conveyed by the commissioners to the assignees, shall vest in such assignees by virtue of their appointment, without any deed of conveyance for that purpose; and that as often as any assignee or assignees shall die or be removed or displaced, and any new assignee or assignees shall be duly appointed, such of the aforesaid real estate as shall remain unsold or unconveyed, shall, by virtue of such appointment, vest in such new assignee or assignees, either alone or jointly with the existing assignees, as the case may require, without any conveyance for the purpose. By the 27th sect. of the same Act it is declared, that where according to the laws in force a conveyance of the property of a bankrupt would require to be registered, recorded or enrolled in any register office in England, Wales or Ireland, or in any registry office, court or place in Scotland, or any of the dominions or plantations belonging to His Majesty, a certificate of the appointment of the assignee in the form therein mentioned, shall be registered in the same place, and have the same effect as the registry, enrolling or recording of any conveyance or assignment of the bankrupt's estate or effects which, by the laws of the country, is required to be registered, recorded or enrolled, &c. [*74]

The rules with regard to bankrupts apply by analogy to insolvent debtors, who are equally considered as being devested of *all right to maintain a suit in respect of any surplus to which they may eventually be entitled. (y) Thus, where a bill was filed by an insolvent debtor against his assignees, under the 14 Geo. 3, c. 77, and also against a debtor to his estate, stating collusion between them, and praying that the assignees might be removed, and that a specific performance of an agreement for a lease might be decreed against the debtor, to which bill a plea was put in by the debtor stating the assignment under the Act, &c., the plea was held to be good. (z) The reasons for the judgment in that case are not given in the report; but it was considered by Lord Eldon as an authority for the rule, that an insolvent debtor is placed in the same situation as that in which a bankrupt is, viz: "that the order, disposition and management of the estate is so far taken out of the party, that he cannot sue in respect of the surplus." (a) [*75]

But although neither a bankrupt nor an insolvent debtor can sue in respect of their interest in the surplus of the property, yet as they have such an interest in the surplus as is capable of assignment, it seems that the persons claiming under such assignments, if made for valuable considerations, may maintain bills respecting them. This appears to have been the opinion of Lord Alvanley, in *Spragg v. Binkes*, (b) though his lordship seems to have doubted whether the

(y) Gill v. Heming, 1 Ridg. P. C. 431; Spragg v. Binkes, 5 Ves. 583.
(z) Bowser v. Hughes, 1 Anst. 101. (a) 9 Ves. 85.
(b) *Supra.*

Court had not gone too far in permitting such assignments, and to have held, that a party could not parcel out a right in accounts to be taken to different persons, so that every one of those persons might file a bill *pro interesse suo*.

The disability of a bankrupt to maintain a suit, does not apply to a certificated bankrupt suing in respect of property acquired subsequently to the allowance of his certificate; but by the 6 Geo. 4, c. 16, it is enacted, that if any person who shall already have been discharged by certificate, or who shall have compounded with his creditors, or who shall have been discharged by any Insolvent Acts, shall be or become bankrupt, and obtain his certificate, such certificate, unless his estate shall produce, after all charges, sufficient to pay [*76] every *creditor under the commission 15*s*. in the pound, shall only protect his person from arrest and imprisonment; but his future estate and effects, except his tools of trade and necessary household furniture, and the wearing apparel of himself, his wife and children, shall vest in the assignees under the commission, who shall be entitled to seize the same in like manner as they might have seized property of which such bankrupt was possessed at the issuing of the commission.

In most respects the situation of an insolvent debtor, as far as regards the right to sue for property acquired previous to his discharge, is similar to that of a certificated bankrupt; but there is a material difference in their situations with regard to after-acquired property. A bankrupt may, as we have seen, after the allowance of his certificate, become entitled to property in the same manner that he might before his bankruptcy, unless it be the case of a second bankruptcy, where he has not paid 15*s*. in the pound; but in the case of an insolvent debtor, his future property is made liable to the payment of his debts contracted before his discharge.

By the 57th section of the Act, before any adjudication is made, the prisoner is to execute a warrant of attorney to authorize the entering up of a judgment against him, at the suit of his assignees, for the amount of the debts stated in his schedule, which judgment is to have the form of a recognizance; and if at any time it shall appear to the satisfaction of the Court that such prisoner is of ability to pay such debts, or any part thereof, or that he is dead leaving assets for that purpose, the Court may permit execution to be taken out thereupon for such sum of money as under all the circumstances of the case the Court shall require, which sum is to be distributed rateably amongst the creditors of the insolvent; and by the 58th and 59th sections, where an insolvent shall after discharge become entitled to property which cannot be taken in execution under the judgment to be entered up on the before-mentioned warrant of attorney, the assignee may, in case the insolvent refuses to convey or assign such property, apply to the Court by petition, and upon such petition the Court may cause the insolvent to be apprehended and committed to custody until he transfers or [*77] assigns such property *to his assignees; and in case any person shall become possessed of any stock or other property belonging to the insolvent, or held in trust for him, or for his use and benefit, or to which he shall be in any way entitled, or shall be in any manner indebted to such insolvent, the Court may, upon application of any assignee or creditor of the insolvent, cause notice to be given to such person, directing him to hold or retain the property till further order, and thereupon it shall be lawful for such Court to order such property to be delivered over to the assignee of the insolvent, for the general benefit of the creditors.

The effect of these clauses in the Act, it is to be observed, is not absolutely to vest the future property of the insolvent in his assignee, but merely to give the assignee, on application to the Court, power to get at it, and to apply it for the benefit of creditors. It would seem, therefore, that for such future property, a person who has taken advantage of the Insolvent Act, must be entitled to sue,

at least till an assignment has been made to the assignee, pursuant to the provisions of the 58th section.

The proper course by which to take advantage of the bankruptcy or insolvency of the plaintiff in a suit, if such bankruptcy or insolvency has occurred previously to the filing of the bill, is by demurrer, if the fact appears upon the bill, (c) and if the fact does not appear it should be pleaded. In *Bowser* v. *Hughes*, (d) which was the case of a plea to a bill by an insolvent debtor against his assignees and a debtor to the estate, the facts stated in the plea appeared upon the face of the bill, and yet the plea was held good; and it has been held, that as at law any matter which arises between the declaration and the plea may be pleaded, so bankruptcy or other matters arising between the bill and plea may be pleaded in equity. (e)

In pleading bankruptcy, all the facts should be stated successively and distinctly; and it will not be sufficient to say that a commission or fiat of bankruptcy was duly issued against the plaintiff, under which he was duly found and declared a bankrupt, and that all his estate and effects have *been thereupon duly transferred to or become vested in his assignees; (f) [*78] a plea of bankruptcy must state distinctly the trading, the contracting debts, the petitioning creditor's debt, the act of bankruptcy, the commission or fiat, and the finding bankrupt. It was formerly necessary to state the assignment of the personal estate to the assignees; and if real estate was in question, it was required that the bargain and sale should be clearly mentioned. (g) That part of the plea is now inapplicable, as in fact, under the Bankruptcy Court Act, no assignment or bargain and sale is necessary, all the real and personal estate of a bankrupt being, by the Act, vested in his assignees upon their appointment. (h)

With respect to the bankruptcy of the plaintiff after the commencement of a suit, or after plea and answer put in, some doubt appears to be entertained whether, in the Court of Chancery, such an event operates as an abatement or not. In the Court of Exchequer it has been frequently determined, that proceedings do not abate by the bankruptcy of the plaintiff; (i) but in the Court of Chancery it seems to be otherwise. In *Sellas* v. *Dawson*, (k) Lord Thurlow appears to have been of opinion, that bankruptcy would abate a suit in any stage prior to the judgment; and that the bankruptcy of a sole plaintiff so far put an end to the suit, that the assignees could not add to it by mere supplemental bill, but must file another original bill in the nature of a supplemental bill; (l) and in *Randall* v. *Mumford*, (m) Lord Eldon observed, that without saying whether bankruptcy is or is not strictly an abatement, the Court has said, that according to the course of the Court, the suit has become as defective as if it were abated. (n)

The difference in the way in which the two Courts look upon the effect of the bankruptcy of the plaintiff *pendente lite*, has led to considerable difference in their rules of practice upon the occasion. In the Court of Exchequer the practice is, for the assignees of a bankrupt, if they wish to take advantage of a *suit commenced by him, to file a supplemental bill; if they omit to do so within the usual period, the defendant may move to dis- [*79] miss the bill, in which case an undertaking to speed the cause will be of no avail, and the bill will be dismissed with costs.

(c) Benfield v. Solomons, 9 Ves. 77.
(d) 1 Anst. 101.
(e) Turner v. Robinson, 1 S. & S. 3.
(f) Carleton v. Leighton, 3 Mer. 667.
(g) Ibid. Arg. 669.
(h) 1 & 2 Will. 4, c. 56, ss. 25, 26.
(i) Bramhall v. Cross, cited 2 Anst. 459; Davidson v. Butler, ibid. 460 n; Randall v. Mumford, 18 Ves. 426.
(k) 2 Anst. 458.
(l) Harrison v. Ridley, Com. R. 589; Lord Red. 64.
(m) 18 Ves. 426.
(n) *Vide* 1 Atk. 263, *notis*.

In the Court of Chancery, however, the practice is otherwise. The effect of bankruptcy in that Court is considered so far to abate the suit, that a common order to dismiss for want of prosecution, having been obtained when the bill was in fact out of Court, is considered as a mere nullity, and upon that ground Lord Thurlow refused to discharge one which had been obtained under such circumstances. (*o*) It seems, however, that bankruptcy is not considered in Chancery as a complete abatement of the suit, and that if the assignees wish to continue it, they must do so, not by bill of revivor, but by a supplemental bill in the nature of a bill of revivor, and that if the defendant wishes to get rid of the suit entirely, although he cannot make the ordinary motion to dismiss, he must adopt a course of proceeding analogous to that pursued where the plaintiff obtains an injunction and dies, in which case the defendant may move that the injunction be dissolved, unless the representatives of the deceased plaintiff revive within a certain time. (*p*) He must move that the assignees may, within a fortnight after notice of the order, file a supplemental bill against him, or in default thereof, that the plaintiff's bill may stand dismissed. This is, however, not a motion of course, and the assignees must be served with it. It should also be supported by an affidavit of facts, (*q*) and it is to be observed, that the dismissal will be without costs, as a bankrupt cannot be made to pay costs. (*r*)

The rule of practice by which a defendant is required to give notice to the assignees in the case of the bankruptcy of a plaintiff, is confined to the case of a sole plaintiff, who, becoming bankrupt, is supposed to be negligent of what is sought by the bill, and the Court, to prevent surprise and save expense, requires [*80] notice to be given to the assignees, but *there is no instance where the Court has taken upon itself to interpose the rule where there are two plaintiffs, one of whom is solvent and the other insolvent, for it is as competent to the solvent plaintiff as it is to the assignees to rectify the suit. (*s*)

In the case of injunctions granted at the suit of a plaintiff who afterwards becomes bankrupt, the course of proceeding appears to be somewhat different from what it is under ordinary circumstances. In such case, the practice which the Court of Chancery has adopted is to require *the bankrupt* to bring his assignees before the Court by bill of revivor, or supplemental bill in the nature of a bill of revivor, or by whatever name it is called; and the Court will make an order to dissolve the injunction and dismiss the bill, unless the assignees shall be brought before it within a reasonable time, (*t*) which order it seems, may be served upon the bankrupt alone, as it is supposed that the bankrupt will find the means of giving his assignees notice. (*u*) Such an order will also be without costs.

The practice in the Court of Exchequer in this respect appears to be similar to that of the Court of Chancery. (*x*)

It is proper in this place to notice a point which has been much discussed, and upon which there appears to have existed considerable diversity of opinion, especially between the Courts of Exchequer and Chancery, viz: the right of the assignees of a bankrupt to institute a suit without the concurrence of the creditors, or rather with respect to the right of the defendant to avail himself

(*o*) Sellas v. Dawson, *ubi supra*.
(*p*) Wheeler v. Malins, 4 Mad. 171.
(*q*) Porter v. Cox, 5 Mad. 80.
(*r*) Wheeler v. Malins, 4 Mad. 171.
(*s*) Caddick v. Masson, 1 Sim. 501; Latham v. Kenrick, ibid. 502.
(*t*) Randall v. Mumford, 18 Ves. 424.
(*u*) Randall v. Mumford, 18 Ves. 424; Wheeler v. Malins, 4 Mad. 171.
(*x*) 1 Fowl. E. P. 286.

of the omission of the assignees to obtain such concurrence, and the manner in which he is to insist upon such right.

By the 5 Geo. 2, c. 30, s. 38, it was provided that no suit in equity should be commenced by any assignee or assignees, without the consent of the major part in value of the creditors of such bankrupt, who should be present at a meeting to be held pursuant to notice given in the London Gazette for that purpose; and by the 6 Geo. 4, c. 16, by which the 5 Geo. 2, c. 30, is repealed, it is enacted (*y*) that the assignees, *with the consent of the major part [*81] in value of the creditors, who shall have proved under the commission, present at any meeting, whereof, and of the purport whereof twenty-one days' notice shall have been given in the London Gazette, may do certain acts therein specified, and that no suit in equity shall be commenced by the assignees without such consent as aforesaid, provided that if one-third in value or upwards of such creditors shall not attend at any such meeting, (whereof such notice shall have been given as aforesaid,) the assignees shall have power, with the consent of the commissioners testified in writing under their hands, to do any of the acts aforesaid.

The first reported case in which the right of the defendant in equity to avail himself of the omission on the part of the plaintiff to procure the necessary consent of the creditors under the 5 Geo. 2, c. 30, s. 38, was that of *Ocklestone* v. *Benson*, (*z*) which came before Sir John Leach, V. C., upon a plea, when his Honor allowed the plea, observing, that if the creditors are not bound by the result of a suit which is commenced by the assignees without the consent of the creditors, then it is not fit that the defendant should be vexed in a suit, which at the pleasure of the creditors, may be to him fruitless; and that, if the creditors are bound by such a suit, then it is fit that a plea should be favoured which is in furtherance of the purposes of the statute. The same question was afterwards raised in *Bevan* v. *Lewis*, (*a*) which was the case of a supplemental bill filed by assignees in consequence of one of the plaintiffs in the original suit having become bankrupt. There was no plea, nor was the point raised by the answer, but the objection was taken at the hearing and overruled by the V. C., (Sir A. Hart) who said that as the objection now insisted on had not been raised by the answer, he was not at liberty, upon reading the record, to assume that the assignees had not had the assent of the creditors.

In *Bozon* v. *Williams*, (*b*) which occurred in the Exchequer upon a plea, the judgment was in favour of the plea, chiefly upon the authority of the decision which had been come to in *Ocklestone* v. *Benson*. The Lord Chief Baron (Sir *W. Alexander) in pronouncing the judgment on that [*82] occasion, confessed that when the case was first opened, he considered that the effect of the statute would have been merely to render the assignee liable for misconduct in instituting a suit without the consent required by the Act, and to give the creditors a remedy against the assignee for so doing, but that after hearing the case cited, (*c*) in which, after consideration, the Master of the Rolls had positively decided that this was a clause of which the defendant might avail himself in the form and under the same circumstances in which the present defendants sought to avail themselves of it, he felt it to be of so much consequence to adhere to former decisions, that he should be unwilling to come to a different conclusion, unless there were some special circumstances to induce him to depart from that decision. His Lordship further observed, "The strongest argument used, and which makes me in some mea-

(*y*) Sect. 88.
(*a*) 2 Glyn & Jameson 245.
(*c*) Ocklestone v. Benson, *supra*.
(*z*) 2 S. & S. 265.
(*b*) 2 Young & J. 475.

sure doubt the accuracy of the report of the case before the Master of the Rolls, is the supposed case of waste, in which it might be necessary to make an immediate application to the Court, and to give the notice required by the Act would only be to accelerate the mischief. The observation is a very strong one, and difficult to be dealt with. When such a case occurs, in what manner the Court will deal with it I will not now undertake to say. If this had been the case of a demurrer, I would have presumed all proper measures to have been taken under the Act, but where the question is put directly in issue by a plea, and it is in the power of the plaintiff to reply to such plea and put the matter in a course of trial, I feel that I am not at liberty to pronounce the provisions of the Act to have been complied with."

After the above case was decided by the Lord Chief Baron, the same point again came under the consideration of the Court of Chancery, upon a demurrer to a supplemental bill, which had been filed by the assignees. (*d*) The defendant in his answer to an original bill filed by the assignees, had insisted upon the fact of the original bill not having been filed with the consent of the creditors, &c., as required by the Act, whereupon the assignees filed a supplemental bill, stating, that since the filing of the original bill, they had obtained the [*83] necessary assent, to *which supplemental bill the defendant demurred, and the Vice Chancellor (Sir L. Shadwell) allowed the demurrer on the authority of *Ocklestone* v. *Benson*, before cited. In *Jones* v. *Yates*, (*e*) however, Sir William Alexander, L. C. B., overruled a demurrer to an original bill, exhibited by the assignees of a bankrupt, on the ground that the assent required had not been obtained, and in doing so his Lordship said, "There is, certainly, great advantage in requiring a plaintiff to state his rights accurately on the record; but it seems to me very questionable whether the Act of Parliament intended that the assignees should be stopped from instituting a suit without the consent of the creditors, or only intended to provide as between the assignees and the creditors, that the assignees should be responsible if they instituted any suit without the consent directed by the Act. In point of fact, the assignees by the assignment to them, get the species of interest which would enable them to institute any action or suit; but then comes the prohibition in the Act. Now, whether that mere prohibition is to have the effect of depriving the assignees of the right which their situation would otherwise give them, or has only the effect of rendering them liable to the creditors for the consequences of any action or suit instituted without their consent, is very questionable. I promised to speak to the other Judges about the demurrer: I have done so, and I am now disposed to overrule the demurrer, but without costs. I have spoken to both the Master of the Rolls and the Vice Chancellor, and if those learned Judges continue of the opinion now entertained by them, a different rule will for the future prevail in the Court of Chancery." It is to be observed, that in a subsequent case before the Vice Chancellor, (*f*) his Honor decided in conformity with *Ocklestone* v. *Bozon*, but that in a case which afterwards occurred before the Master of the Rolls, (Sir John Leach) in which an objection upon the above ground was taken at the hearing, his Honor said that he had had an opportunity of conversing with some of the Judges at common law upon the point, and their impression was according to the inclina- [*84] tion of opinion which he had expressed at the *hearing; viz: that the provision made in the statute was to be considered as made for the benefit of the creditors alone, and that it was not competent to the defendant to take advantage of the objection that the suit had been instituted without the consent of the creditors. "Upon the whole," his Honor said, "I do not

(*d*) King v. Tullock, 2 Sim. 469. (*e*) 3 Y. & J. 373.
(*f*) Smith v. Biggs, (6 July, 1832,) 5 Sim. 391.

now hesitate to decide that this suit can be well sustained by the assignee, and that he is entitled to the decree sought by this bill." If there be collusion between the plaintiffs and defendants in a suit instituted by the assignees without the previous consent of the creditors, the judgment of the Court will bind the interest of the creditors, but the assignees in such case take upon themselves the responsibility that the suit is properly instituted and properly conducted. (*g*)

With reference to this point it is to be observed, that the Insolvent Debtors' Act, 1 Geo. 4, c. 119, contains a clause nearly to the same effect as that in the Bankrupt Act above referred to. By the 11 sect. it is enacted "that no suit at law be proceeded in further than an arrest in *mesne* process, or suit in equity be commenced by any assignee or assignees of any such prisoner's estate and effects, without the consent of the major part in value of the creditors of such prisoner, who shall meet together pursuant to a notice to be given, &c. for that purpose, and without the approbation of the commissioners of the said Court;" and the Court of Common Pleas have expressed an opinion, that this clause does not make it necessary for an assignee under the Act to prove at the trial of an action brought by him on account of the insolvent's estate, that he was authorized in the manner prescribed by the above section. In delivering the opinion of the Court, Lord Chief Justice Best, said, that the legislature did not intend to increase the expense of suits brought for the benefit of insolvent estates, or to give any advantage to those who endeavour to withhold from the assignees what belongs to such estates, which consequences, if the construction contended for by the defendant were to prevail, would both follow; "If an action is brought without the proper authority, this Court might perhaps stop it on motion, or the Insolvent Debtors' Court might order their officer to suspend or discontinue it. I doubt, however, whether either *Court should [*85] interfere on the application of a defendant; he can in no way avail himself of this provision in the Act, as it was not made for his benefit. I am convinced he can make no use of it at the trial of an ejectment brought against him." (*h*) In a subsequent case, which arose upon the construction of the present Act for the relief of insolvent debtors, (*i*) the Court of Common Pleas were of opinion, upon the same grounds, that the 16th section of that Act was only confirmatory of the assignee's right to sue, and that he might sue without the order of the Court of Insolvent Debtors required by that section. (*k*)

In this place it is right to notice another section in the Insolvent Debtors' Act, which has been the subject of much discussion in the Court. By the 7 Geo. 4, c. 57, s. 26, it is enacted, "that whenever any such assignee or assignees shall die or be removed, and a new assignee or assignees shall be appointed in pursuance of the provisions of this Act, no action at law or suit in equity shall be thereby abated, but the Court in which any action or suit is depending, may, upon the suggestion of such death or removal and new appointment, allow the name or names of the surviving or new assignee or assignees to be substituted in the place of the former; and such action or suit shall be prosecuted in the name or names of the said surviving or new assignee or assignees, in the same manner as if he or they had originally commenced the same." (*l*) Under this section an application was made to the Vice Chancellor for leave to substitute the name of a new provisional assignee as a defendant, in lieu of a provisional assignee who had been originally made a defendant, but had been removed from his office, and an order was made to that effect; (*m*)

(*g*) Piercy v. Roberts, 1 Mylne & Keen, 8–11.
(*h*) Doe dem. Clark v. Spencer, 3 Bing, 203.
(*i*) 7 Geo. 4, c. 57. (*k*) Dance v. Wyatt, 6 Bing, 486.
(*l*) A similar section occurs in the Bankrupt Act, 6 Geo. 4, c. 16, s. 7.
(*m*) Gilchrist v. Renton, Younge E. R. 387, n.

but upon a similar application being made to the Court of Exchequer, Lord Lyndhurst, C. B., said that the section applied only to the case of the assignee being plaintiff, and not where he is defendant; (*n*) and in a subsequent case before Lord Brougham, L. C., the opinion of Lord Lyndhurst was confirmed, (*o*) so that the *rule may now be taken to be settled, that the [*86] section in question applies only to cases where the assignee or assignees fill the character of plaintiffs, and that it extends to the provisional assignee of the Court, as well as to assignees otherwise appointed under the Act.

As the Bankrupt Act, 6 Geo. 4, c. 16, contains a section (*p*) nearly in the same words with that above quoted from the Insolvent Debtors' Act, it is presumed that the same rule will apply to assignees of a bankrupt. According to the old practice with regard to them, where some died or some were discharged, and others by order of the Court, put in their room, the new assignees might have had the benefit of the former suit by filing a supplemental bill, but now, by the above Act, whenever an assignee who is a plaintiff in a suit shall die, or a new assignee or assignees shall be appointed, no action at law or suit in equity will be thereby abated, but the Court may, upon the suggestion of such death, &c., allow the name of the new assignee or assignees to be substituted in the place of the former, and the action or suit to be prosecuted in the name or names of the surviving or new assignee or assignees, in the same manner as if he or they had originally commenced the same.

By sect. 89 of the Bankrupt Act, 6 Geo. 4, c. 16, in any commission against one or more of the members of a partnership, the assignees may, upon obtaining the order of the Lord Chancellor, prosecute any suit or action in the name of such assignees and of the remaining partner or partners, against any debtor of the partnership, and may obtain such judgment, decree or order, as if the action or suit had been instituted with the consent of the other parties.

It was formerly necessary in all actions where the assignees, either as plaintiffs or defendants, claimed property under the bankrupt, to prove strictly the three requisites to support the commission; viz: the trading, the act of bankruptcy, and the petitioning creditor's debt, as well as that the commission was regularly issued, and the assignment duly executed. Upon failure of proving any one of these matters, (the proof of which adds considerably to the costs of an action, and is often difficult *to be established by strict rules of [*87] evidence,) the assignees were nonsuited, and thus frequently prevented from recovering a just debt due to the bankrupt's estate. To provide in some measure for this evil, the 49 Geo. 3, c. 121, ss. 10, 11, enacted, that the commission and proceedings should be evidence of the petitioning creditor's debt, the trading and act of bankruptcy, unless the other party, before a particular period of the suit, should give notice of his intention to dispute them. But this, it seems, did not afford an effectual check to the vexatious defence so frequently set up to actions brought by assignees, notwithstanding the defendant was liable to pay the costs of forcing them to prove these several matters on the trial. The legislature therefore thought it expedient to enact, that in certain cases no such proof should be required from the assignees; and in others that the depositions of these matters before the commissioners should be conclusive evidence, confining in reality the former general obligation of proof under the old system, to what may now be considered as excepted cases under the new. Thus, by section 90 of the 6 Geo. 4, c. 16, it is declared, that in any action by or against an assignee, or any commissioner or person acting

(*n*) Bainbridge v. Blair, ibid. 386.
(*o*) Mendham v. Robinson, 1 Mylne & Keen, 217.
(*p*) Sect. 7.

under the warrant of the commissioners, for anything done as such commissioner or under such warrant, no proof shall be required at the trial, of the petitioning creditor's debt, the trading or act of bankruptcy, unless the other party in such action shall (if defendant, at or before pleading, and if plaintiff, before the issue joined,) give notice in writing to such assignee, commissioner or other person, that he intends to dispute some, and which of such matters. And the party giving notice renders himself liable to the costs occasioned by it, if the disputed matter is proved by the other party upon the trial. By section 91, also, a similar provision is made as to suits in equity by or against the assignees, unless the party in the suit shall, within ten days after rejoinder, give notice in writing to the assignees of his intention to dispute; in which case, if the assignees shall prove the matter so disputed, the costs occasioned by the notice are, in the discretion of the Court, to be paid by the party giving it. These two clauses, it will be perceived, are not *(like those in the former statute) (q) confined to actions and suits by or against [*88] the assignees, but extend to those against the commissioners or any person acting under them. There is also a material difference in the enactments; the former statute providing that in case of no notice being given, "the commission, and the proceedings of the commissioners under the same, shall be evidence to be received" of the petitioning creditor's debt, the trading and act of bankruptcy, while the present statute declares, that "no proof shall be required at the trial" of those matters. (r) It is to be observed, moreover, that where the assignees sue for a debt or demand for which the bankrupt might himself have sued, the 6 Geo. 4, c. 16, takes away from the defendant all power whatever of contesting those proceedings after a certain period allowed the bankrupt to dispute the validity of the commission, for, by section 92 it is declared, that if the bankrupt shall not, (if he be within the United Kingdom at the issuing of the commission,) within two calendar months after the adjudication; or (if out of the Kingdom) then within twelve calendar months, give notice of his intent to dispute the commission, and proceed therein with due diligence, the depositions taken before the commissioners of the petitioning creditor's debt, the trading and act of bankruptcy, shall be conclusive evidence of the matters therein respectively contained, in all actions or suits brought by the assignees for any debt or demand for which the bankrupt might have sustained any action or suit. (s)

*It is to be noticed, that this section of the Act extends only to [*89] those cases in which an action or suit is brought by the assignees for any debt or demand for which the bankrupt himself might have sustained a

(q) 49 Geo. 3, c. 121, s. 10, 11. (r) 1 Deacon's Bankrupt Law, 757.

(s) By the new Bankruptcy Court Act (1 & 2 Will. 4, c. 56, s. 27,) if a trader, adjudged a bankrupt, wishes to dispute the adjudication, he must present a petition praying the reversal thereof, to the Court of Review, within a certain period limited by the Act, and then the Court must proceed to hear and decide on the petition, or, at the option of the bankrupt, (on his finding security for costs, if required,) to direct an issue to try any matter of fact, affecting the validity of such adjudication, by a jury to be empannelled and sworn for that purpose before the Chief Judge, or any one or more Judges of the Court, in which case it is declared, that if the verdict in such issue should not be set aside on application made to the Court of Review within one month after the trial, or in case no issue should be directed, if the adjudication of the commissioners should not be set aside by the Court of Review on the petition, such verdict or adjudication of the commissioners shall in all cases, as against the bankrupt, and also as against the petitioning creditor, and as against any assignee to be chosen of the bankrupt's estate and effects; and all persons claiming under the assignees, and all persons indebted to the bankrupt's estate, be conclusive evidence that the party was or was not a bankrupt at the date of such adjudication; and a power of appeal is given by the same section to the Lord Chancellor, from any decision of the Court of Review, upon any matter of law or equity, or on the refusal or admission of evidence only.

suit; in those cases, therefore, in which the bankrupt himself, supposing he had not become one, would have had no right to maintain a suit, as in the case of a suit brought by the assignees to recover back the payment of a debt made by the bankrupt to his creditor, after his knowledge of an act of bankruptcy, or after the issuing of the commission or fiat; the Act does not deprive the defendant of the right to dispute the petitioning creditor's debt, the trading and act of bankruptcy at any time, upon giving the requisite notice of his intention to do so. (*t*)

It is also to be observed, that the term *conclusive* evidence, as applied in the act to the depositions taken before the commissioners, must be understood as only applying to the facts contained in the depositions, and not to the conclusion of law drawn by the witnesses or the commissioners from them; (*u*) for though no evidence can be produced to contradict the facts deposed to, yet if the depositions *on the face of them* are not legal proof of the petitioning creditor's debt, and of the trading and act of bankruptcy, they cannot be received in evidence, notwithstanding they have been considered as proved by the commissioners. Thus, though the deposition of the witness to prove the act of bankruptcy will be conclusive evidence *of the time* when the bankrupt did a certain act, and of the fact itself, it will not be evidence of its amounting to an act of bankruptcy. So the deposition of the petitioning creditor will be evidence of a certain sum due to him, and also of the character in which he claimed it, whether as executor or assignee; nor will it be necessary in either of these cases to produce the probate, or the assignment; (*x*) but whether the sum due was a *debt to support a commission, that* is an inference of law which the Court upon the trial [*90] will not be estopped from determining by the adjudication *of the commissioners. So, if a deposition state that the deponent witnessed the execution of a deed by the bankrupt, by which he assigned his property to A. B. Though this is evidence of such a deed as stated in the deposition, (*y*) yet it is not evidence that the deed itself was an act of bankruptcy.

The whole effect, indeed, of the provision of the statute is only to make the depositions evidence, not to declare the fact of the bankruptcy to have been proved, for this must be as strictly made out by the depositions, as it would be required to be done by witnesses. (*z*) If the facts, therefore, stated in the depositions are sufficient of themselves to sustain the bankruptcy, no farther proof is necessary; (*a*) but they may be always objected to for not proving the subject-matter to which they apply. Thus, if the deposition of the petitioning creditor state only that the debt was due to him at and *before the time of suing forth the commission*, not showing that it existed at the time of the act of bankruptcy, this would be defective proof of the petitioning creditor's debt. (*b*) So, upon a commission sued out against the drawer of a bill of exchange, if the deposition does not state presentment and notice, there will not be sufficient evidence of the debt. (*c*) And again, where the deposition of the witness to prove the act of bankruptcy stated that the party absented himself on a certain day, and that he had declared to the deponent that his motive was to avoid his creditors, but *not stating the time* when this declaration of the bankrupt was made; this was ruled not to be sufficient proof of an act of bankruptcy. (*d*)

In every case, however, where the depositions turn out to be insufficient proof of any of the requisites to support the commission, the assignees will not

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(*t*) 1 Deacon, 777.
(*u*) Ibid.
(*x*) Skaife v. Howard, 2 B. & C. 560.
(*y*) Kay v. Stead, 2 Star. 200.
(*z*) Rawson v. Haigh, 1 Car. 80.
(*a*) Per Abbott, C. J., 2 B. & C. 560.
(*b*) Clarke v. Askew, 1 Star. 458; and see Lawton v. Robinson, ibid. 456.
(*c*) Cooper v. Machin, 1 Bing. 426.
(*d*) Marsh v. Meager, 1 Star. 353.

be prevented from establishing these facts by other evidence. (*e*) And it is to be remarked, that where the defendants to a suit brought by the assignees of a bankrupt, or any of them, are infants, they will be entitled to dispute the validity of the bankruptcy, without giving *the notice required by the Act. This was decided by Sir J. Leach, V. C., in the case [*91] of *Bell* v. *Tinney*, (*f*) in which a bill was filed by the assignees of a bankrupt to set aside a settlement which had been made by the bankrupt upon his wife and children. There was no other evidence of the bankruptcy but the commission, which the counsel for the plaintiff insisted was sufficient under the 9 Geo. 3, c. 121, s. 11, but the Vice Chancellor held, that as there were infant defendants he would not bind them, by the want of the notice required by the Act; and directed an inquiry before the Master, whether a commission had been duly issued against the bankrupt.

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*CHAPTER III. [*92]

Part II.

OF PERSONS WHO ARE DISQUALIFIED FROM SUING ALONE.

Sect. I.—*Of Infants.*

We come now to the consideration of those disqualifications which only incapacitate a person from maintaining a suit alone, but do not prevent his suing in equity, provided his suit be supported by another person. Such disqualifications arise from *infancy*, *idiotcy*, *lunacy or imbecility of mind*, and *marriage*. With respect to infants, idiots, lunatics, and persons of weak minds, the law considers that by reason of the immaturity or imbecility of their intellects, they are incapable of asserting or protecting their own rights, or of forming a judgment as to the necessity of applying for protection or redress to the tribunals of the country; it therefore requires that whenever it is necessary that application should be made on their behalf to a court of justice, such application should be supported by some person who may be responsible to the Court that the suit has not been wantonly or improperly instituted. With respect to married women, their incapacity does not arise from want of reason, (*a*) but from the circumstance that by the law of this country the property of all women in a state of coverture vests in the husband, the consequence of which rule is, that no suit can be maintained by the wife without her husband being joined as a co-plaintiff with her. In those cases, however, in which by the peculiar doctrines of a Court of Equity she is considered entitled to property separate and distinct from her husband, if it should so occur that her interests are in opposition to those of her husband, Courts of Equity will permit her to sue in her own name, but then some person must be joined with her in the suit, who may be responsible for the costs of the proceedings, *in case it should appear that the suit has been improperly instituted or [*93] conducted.

(*e*) Clarke v. Askew, 1 Star. 458.
(*f*) 4 Mad. 372.
(*a*) Co. Litt. 346, a. & b.

In the present section, the attention of the reader will be directed to the peculiarities in the practice of the Court, arising from the circumstance of the party, or one of the parties suing being an *infant*.

The laws and customs of every country have fixed upon particular periods at which persons are presumed to be capable of acting with reason and discretion. According to the law of this country, a person is styled an infant until he attains the age of 21 years, which is termed his full age. (*b*)

An infant attains his full age on the completion of the day which precedes the twenty-first anniversary of his birth; but, as the law will make no fraction of a day, he may do any act which he is entitled to do at full age, during any part of such day. Thus it has been adjudged, that if one is born on the 1st of February, at 11 at night, and on the last day of January, in the 21st year of his age, at one of the clock in the morning, he makes his will of lands and dies, it is a good will, for he was then of full age. (*c*)

Although for many purposes an infant is under certain legal incapacities and disabilities, there is no doubt that a suit may be sustained in any Court, either of Law or of Equity, for the assertion of his rights or for the security of his property, and for this purpose a child has been considered to have commenced his existence as soon as it is conceived in the womb. Under such circumstances it is termed in law an infant *en ventre sa mere*, and a suit may be sustained on its behalf, and the Court will, upon application in such suit, grant an injunction to restrain waste from being committed on his property. (*d*)

In *Robinson* v. *Litton*, (*e*) Lord Hardwicke seems to have considered that the point that a Court of Equity would grant an injunction to stay waste at the suit of an infant *en ventre sa mere*, though it had often been said *arguendo*, [*94] had never been decided; but it seems that, though Lord Hardwicke was not *aware of the circumstance, such an injunction was actually granted by Lord Keeper Bridgman. (*f*)

But although an infant may maintain a suit for the assertion of his rights, he can do nothing which can bind himself to the performance of any act, and therefore, where from the nature of the demand made by the infant it would follow that if the relief sought were granted, the rules of mutuality would require something to be done on his part, such a suit cannot be maintained. Thus it has been held, that an infant cannot sustain a suit for the specific performance of a contract, because in such cases it is a general principle of Courts of Equity to interpose only where the remedy is mutual, and if a decree were to be made for a specific performance, as prayed on the part of the infant, there would be no power in the Court to compel him to perform it on his part, either by paying the money or executing a conveyance. (*g*)

Although an infant, as we have seen, in general is capable of maintaining a suit, yet on account of his supposed want of discretion, and his inability to bind himself and make himself liable to the costs, he is incapable of doing so without the assistance of some other person who may be responsible to the Court for the propriety of the suit in its institution and progress. Such person is called *the next friend* of the infant, and if a bill is filed on behalf of an infant without a next friend, the defendant may move to have it dismissed with costs, to be paid by the solicitor. In a case however, where a bill was filed by the plaintiff as an adult, and it was afterwards discovered that he was an infant at the time of filing the bill, and still continued so; whereupon the

(*b*) Jacob's Law Dict. tit. Infant.
(*c*) Anon. Salk. 44, Sir R. Howard's case, ibid. 265.
(*d*) Musgrave v. Parry, 2 Vern. 710.
(*e*) Robinson v. Litton, 3 Atk. 209; Wallis v. Hodson, 2 Atk. 117.
(*f*) Luttrel's case, cited Prac. Ch. 50. (*g*) Flight v. Bolland, 4 Russ. 298.

defendant moved that the bill might be dismissed, with costs to be paid by the plaintiff's solicitor, the Vice Chancellor made an order that the plaintiff should be at liberty to amend his bill, by inserting a next friend. (*h*)

When an infant claims a right or suffers an injury on account of which it is necessary to resort to the extraordinary jurisdiction of the Court of Chancery, his nearest relation is supposed to be the person who will take him under his protection, and institute a suit to assert his rights or to vindicate his *wrongs; and it is for this reason that the person who insti- [*95] tutes a suit on behalf of an infant is termed his *next friend.* But as it frequently happens that the nearest relation of the infant himself withholds the right, or does the injury, or at least neglects to give that protection to the infant which his consanguinity or affinity calls upon him to give, the Court, in favour of infants, will permit any person to institute suits on their behalf, (*i*) and whoever thus acts the part which the nearest relation ought to take, is also styled *the next friend* of the infant, and is named as such in the bill. (*k*) And it is to be observed, that although an infant has a guardian assigned him by the Court, or appointed by will, yet where he is plaintiff, the course is not to call the guardian by that name, but to call him the next friend, &c. But where the infant is defendant the guardian is so called; and if the guardian be so called where the infant is plaintiff, it is no cause of demurrer. (*l*)

As any person may institute a suit on behalf of an infant, it frequently occurs that two or more suits are instituted in his name, by different persons, each acting as his next friend; in such cases the Court will direct an inquiry to be made by one of the Masters, as to which suit is most for his benefit; and when that point is ascertained, will stay the proceedings in the other suit; (*m*) and it is a motion of course that such a reference should be made. (*n*) As some check, however, to the general licence to institute a suit on behalf of an infant, the Court will, if it is represented that a suit preferred in his name is not for his benefit, direct an inquiry to be made in a similar manner; and if, upon such inquiry, the Master reports that the suit is not for the benefit of the infant, the proceedings will be stayed. (*o*) Thus, where a bill was filed on behalf of infants against their mother, for an account of the personal estate of their father, and several of the relations of the infants by the father's side, together with some of their relations by the mother's side nearer than the *prochein amy*, made an affidavit that due care was taken of the infants, and of the estate, with which they were well satisfied, and that they believed the suit was instituted rather *out of a *pique* than any real concern for the infants' benefit. The Master of the Rolls, upon a petition, [*96] ordered that it should be referred to the Master to certify whether the suit was brought for the benefit of the infant plaintiffs, and whether it was proper that the same should be prosecuted or not. The defendant to procure the report within a month. (*p*)

In pursuance of the above order, the Master made his report, stating the facts as above; and that he did not conceive that the suit as then brought was for the benefit of the infants, or proper to be prosecuted; but that he thought, if a proper bill were brought by a proper *prochein amy*, with a real intention to secure the estate of the infants, it might be for their benefit that such suit should be prosecuted. In the meantime, the agents of the defendant perceiving

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(*h*) Ibid.
(*i*) Andrews v. Cradock, Prec. in Cha. 376; Anon. 1 Atkyns, 570.
(*k*) Lord Red. 20.
(*l*) Toth. 9; Prac. Reg. 244.
(*m*) Lord Red. 21.
(*n*) *Per* Ld. Eldon, 7 Dec. 1816, MSS.
(*o*) Lord Red. 21.
(*p*) Da Costa v. Da Costa, 3 P. Wms. 140.

the opinion of the Master, filed a new bill in the infants' name by another *prochein amy*, for an account of the infants' estate, in order to improve it, and moved the Lord Chancellor that the former bill might be dismissed, with costs to be paid by the *prochein amy;* which order the Lord Chancellor (King) made, observing, that the report of the Master not being excepted to, must be taken to be true; and that since such report certified that it was not proper the suit should be prosecuted, not being for the infants' benefit, he would not suffer any further proceedings upon it, at least as yet. With respect to the second suit he said, that seeing the Master had reported that a suit might be brought for the benefit of the infants, and it did not then appear whether the last bill came within that description, all he should do would be to prevent the parties from proceeding in both bills, which would be vexatious. He therefore ordered all the proceedings to be stayed in the first bill, in disfavour of which the Master had reported. (*q*)

In a more recent case, before Sir J. Leach, V. C., where a suit was instituted on behalf of infants, and the next friend was a solicitor wholly unconnected with the family, it was, on the motion of the defendant, who was the [*97] accounting party, referred to the Master to inquire whether it would be for the *benefit of the infants that the suit should be prosecuted, the defendant undertaking to render to the Master, upon affidavit, the accounts prayed by the bill. (*r*) And in a late case before Lord Brougham, where an application was made, on behalf of the defendants, that the next friend of the infant plaintiff might be restrained from further proceeding with the suit, and for a reference to the Master to appoint a new next friend to conduct it in his stead; which application was supported by strong affidavits, to show that the suit had in fact been instituted from improper motives, for the purpose of benefiting the solicitor, at whose request the person named as next friend, (who was a stranger to the family, and had lately held the situation of farm servant or bailiff at monthly wages,) had consented to act as such, his Lordship directed the Master to inquire not only whether the suit was for the benefit of the defendant, but whether the next friend was a fit and proper person to be continued in that character. The Master was also directed to inquire who would be the proper person to conduct the suit, in case the next friend was removed, and to report special circumstances. (*s*)

No such references, however, as those last mentioned, will be ordered at the instigation of the next friend himself, because the Court considers, that in commencing a suit, the next friend undertakes on his own part that the suit, he has so commenced, is for the benefit of the infant. (*t*)

This rule, nevertheless, applies only to cases where an application is made for such a reference in the cause itself; if there is another cause pending by which the infant's property is subject to the control and disposition of the Court, such a reference is not only permitted, but is highly proper, when fairly and *bonâ fide* made, and may have the effect of entitling the next friend to repayment of his costs out of the infant's estate, even though the suit should turn out unfortunate, and the bill be dismissed with costs. (*u*)

It is to be observed that reports made upon references of this description [*98] cannot be excepted to; thus in a case where it had *been referred to a Master to see whether a suit instituted on behalf of infants by a *prochein amy* was necessary, with liberty to the Master to state special circumstances, &c., and the Master by his report stated several circumstances, and certified the suit to be unnecessary; upon a motion to confirm the report, and

(*q*) Ibid. 141, 142.
(*s*) Nalder v. Hawkins, 2 M. & K. 243.
(*t*) Jones v. Powell, 2 Mer. 141.
(*r*) Richardson v. Miller, 1 Sim. 133.
(*u*) *Vide* Taner v. Ivie, 2 Ves. 466.

dismiss the bill, the counsel for the next friend entered into observations on the evidence before the Master, and it was at first doubted whether this would not be a more proper subject for exceptions to the report, but the registrar, Mr. Dickens, being consulted, declared it to be the practice of the Court not to except to reports of this kind (which where in the nature of cases for the opinion of the Court,) but to object to them on the motion to confirm. (*w*)

In the same case the counsel for the *prochein amy* alleged that the suit had been instituted by the solicitor entirely, without his privity or consent; in confirmation of which a written acknowledgment by the solicitor was produced, whereby he avowed having instituted the suit without the privity of the *prochein amy*, and the counsel for the *prochein amy* had no instructions to resist the motion any further than to pray that the solicitor might be directed to pay the costs; but the Lord Chancellor was of opinion, that in the then stage of the business, the Court could not take notice of the question as between the *prochein amy* and the solicitor, but must take it to be the act of the *prochein amy*, who ought to make a direct application against the solicitor if he had acted improperly. (*x*)

If an infant is made a co-plaintiff with others in a bill, and it appears that it will be more for his benefit that he should be made a defendant, an order to strike his name out as plaintiff, and to make him a defendant, may be obtained upon motion; (*y*) and it is to be observed, that an infant heir-at-law, against whose estate a charge is sought to be raised, ought to be made a defendant, and not a plaintiff, although he is interested in the charge when raised; and that where an infant heir had, under such circumstances, been made a co-plaintiff, Lord Redesdale ordered the cause to stand over, with liberty for the plaintiffs to amend, by making the heir-at-law a defendant instead of *plaintiff, and thereupon to prove the settlement anew against him as a [*99] defendant. (*z*) The reason given by the reporter for this practice is, because an infant defendant, where his inheritance is concerned, has in general a day given him after attaining twenty-one, to show cause, if he can, against the decree, (*a*) and is in some other respects privileged beyond an adult; but an infant plaintiff has no such privilege, and is as much bound as one of full age. This was decided in *Lord Brook* v. *Lord Hertford*, (*b*) in which an objection was taken because the will under which the infant plaintiff claimed had not been proved, and the Court held that it was not material; for an infant when plaintiff is as much bound, and as little privileged, as one of full age. In this respect Courts of Equity only follow the rule of law, where it is held that an infant is as much bound by a judgment in his own action as an adult; and upon this principle, where a former decree signed and enrolled in a suit where an infant was plaintiff, was pleaded to a new bill by the same plaintiff relative to the same matter, the Court held that the plea was good. (*c*)

If, however, gross *laches* or fraud and collusion should appear on the part of the *prochein amy*, the defendant may open the decree by a new bill, as much as a person of full age. (*d*) And although an infant is in general bound by a decree in a cause in which he himself is plaintiff, yet there is no instance of the Court's binding the inheritance of an infant by any discretionary act of the

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(*w*) Whittaker v. Marlar, 1 Cox, 285. (*x*) Ibid. 286.
(*y*) Tappen v. Norman, 11 Ves. 563.
(*z*) Plunket v. Joice, 2 Scho. & Lef. 159.
(*a*) By 1 Will. 4, c. 47, s. 11, the privilege of an infant heir or devisee to have a day to show cause against a decree for the selling the estate of his ancestor or devisor, for payment of his debts, is taken away.
(*b*) 2 P. Wms. 519. (*c*) Gregory v. Molesworth, 3 Atk. 626.
(*d*) Sheffield v. Duchess of Buckinghamshire, 1 Atk. 628.

Court. As to personal things, such as the composition of debts, &c., it has been done, but never as to the inheritance, for that would be taking on the Court a legislative authority, and doing that which is properly the subject of a private Act of Parliament. (*e*) According to this doctrine, in *Lord Brook* v. *Lord Hertford*, above referred to, which was the case of a bill filed by an infant plaintiff for a partition against a co-tenant in common, although the Court decreed a partition, it would not direct any conveyance to be made until the [*100] infant *plaintiff attained twenty-one; (*f*) and so in *Taylor* v. *Philips*, (*g*) where it had been referred to the Master to see whether certain proposals which had been made as to the surrender of a copyhold estate by the infant plaintiff were reasonable, and for the infant's benefit; and the Master reported that they were so, the Court, nevertheless, would not make the order for the surrender without inserting the words "without prejudice to the plaintiff, the infant, after he shall attain the age of 21 years." (*h*)

In general, however, where decrees are made in suits by infant plaintiffs, it is not usual to give the infant a day to show cause; and in *Gregory* v. *Molesworth*, (*i*) Lord Hardwicke observed, that he knew but of one case that was an exception, viz: that of *Lady Effingham* v. *Sir John Napier*, (*j*) where upon an appeal from Lord Macclesfield's decree with regard to real estate, the House of Lords gave Sir John Napier leave to show cause, when he came of age, against his own decree. It is observable, however, that the order in that case was made under very peculiar circumstances: a bill had been filed on behalf of Sir John Napier, an infant, by his *prochein amy* claiming as heir in tail under a settlement, to set aside a post-nuptial settlement made by his father on his wife, Lady Effingham Howard; and a cross bill had been filed by Lady Effingham against Sir J. Napier and the trustees, to have a conveyance made to her and her heirs of the estates comprised in the settlement. *Both cases came on to be heard at the same time*, and a decree was made, from which both parties appealed, and the order made by the House of Lords was, *inter al.* that as to so much of the decree as ordered Sir John Napier's bill to be dismissed so far as the same sought to set aside the settlement, the same should be affirmed, with this addition:—"Unless Sir John should, within six months after his attaining his age of twenty-one, show cause to the Court of Chancery to the [*101] contrary." *It was also ordered that the trustees should convey the estates in the settlement to Lady Effingham and her heirs, unless Sir J. Napier should, on attaining twenty-one, show good cause to the contrary to the Court of Chancery. Now, it is to be observed, that the relief granted by the latter part of the order was the relief prayed by Lady Effingham's cross bill, and must have been made in consequence of that suit; it was therefore perfectly regular in that part of the decree to give Sir J. Napier, who was a defendant in the suit, a day to show cause against it; and such being the case, it would have been very absurd not to have given him an opportunity of showing cause against that part of the decree which dismissed his own bill,

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(*e*) Taylor v. Philips, 2 Ves. 23.

(*f*) Where decrees are made for partitions, and some of the parties are infants and others adult, the practice now is, not to direct the mutual conveyances to be executed by any of the parties till all the infants shall have become of age, and have had an opportunity of showing cause against the decree; and in the meantime the decree only extends to make the partition, give possession and order enjoyment accordingly, till effectual conveyances can be made. *Vide* the decree in Agar v. Fairfax, 17 Ves. 545, 554; Attorney General v. Hamilton, 1 Mad. 214.

(*g*) 2 Ves. 23.

(*h*) Belt. Supp. to Vesey, 259.

(*i*) 3 Atk. 626.

(*j*) 2 P. Wms. 401; 3 Bro. P. C. 340; Mos. 67.

by which he sought to impeach the settlement, as by so doing the Court would in one part of the decree have given him an opportunity of controverting it, which, by other parts of the decree, they would have deprived him of. The result of the case of *Lady Effingham* v. *Napier*, was, that when Sir John Napier came of age he preferred a petition, supported by affidavits to the Lord Chancellor, for liberty to file a new bill, or to amend his former bill, and also to amend his answer to the cross bill, on the ground that the causes had been greatly mismanaged by his solicitor, upon which the Lord Chancellor (Lord King) having called to his assistance the Master of the Rolls (Sir Joseph Jekyll,) ordered that Sir John Napier should be at liberty to amend his answer in the cross suit, or to put in a new one, and should have time till the first day of next Term; but as no precedent appeared for amending a bill after the same had been dismissed upon the merits, that part of the petition was refused, but liberty was given him to rehear both the causes, which were ordered to stand over till after the time for amending the answer, or putting in a new answer had expired. (*k*)

When a day is given to an infant plaintiff to show cause against a decree after he comes of age, the proper course appears to be to have the cause reheard, for which purpose he must, within the period appointed, present a petition of rehearing. (*l*)

Though an infant is, in ordinary cases, bound by the effect *of any suit or proceedings instituted on his behalf, and for his benefit, yet if there has been any mistake in the form of such suit, or of the proceedings under it, or in the conduct of them, the Court will, upon application, permit such mistake to be rectified. [*102]

Thus, an infant plaintiff may have a decree upon any matter arising from the state of his case, though he has not particularly mentioned and insisted upon it, and prayed it by his bill; and accordingly where a bill was filed on behalf of an infant, claiming, as eldest son of his grandfather's heir-at-law, the benefit and possession of an estate, and to have an account of the rents, profits, &c., and for general relief; and, upon the hearing, an issue was directed to try whether his father was legitimate, which the jury found he was not; so that the plaintiff's claim as heir-at-law was defeated; he was yet allowed to set up a claim to part of the estate, to which it appeared that he was entitled under certain deeds executed by his grandfather, but which claim was in no way raised or insisted upon by his bill, although the Court said it might have been otherwise if he had been adult. (*m*) And where the persons acting on behalf of an infant plaintiff, by mistake make submissions or offers on behalf of the infant, which the infant ought not to have been called upon to make, the Court will not suffer the infant to be prejudiced. Thus, where an infant plaintiff had, by mistake, submitted by her bill to pay off a mortgage, which she was not liable to pay, the Master of the Rolls said he must take care of the infant, and not suffer her to be caught by any mistake of her agent; and therefore, the infant was allowed to amend her bill, on paying the costs of the day. (*n*)

In general, however, in matters of practice, infants as well as adults, are bound by the conduct of the solicitor acting *bonâ fide* in their behalf. (*o*) Thus, where in a case of pedigree, the solicitor concerned for the infant concurred in the use of affidavits before the Master instead of interrogatories, Sir Thomas Plumer, M. R., held that the infants were thereby bound; and although the

(*k*) Mos. 67; 2 P. Wms. 401; 3 Bro. P. C. 340.
(*l*) Prac. Reg. 225.
(*m*) Stapilton v. Stapilton, 1 Atk. 6; *vide etiam* De Manneville v. De Manneville, 10 Ves. 52.
(*n*) Serle v. St. Eloy, 2 P. Wms. 386. (*o*) Tillotson v. Hargrave, 3 Mad. 494.

[*103] Court will not in general make any *decree by consent where infants are concerned, without referring it to a Master to inquire whether it will be for their benefit; yet when once a decree is pronounced without that previous step, the authority of it is the same as if it had been referred to the Master, and he had made a report that it would be for their advantage. So an order for maintenance, though not usually made without reference to a Master, yet if made without, will be equally binding. (q)

It seems to have been the opinion of Lord Eldon, that facts could not be stated in a case for the opinion of a Court of Law so as to bind infants. (q)

It has been before stated, that any person, who may be willing to undertake the office, may be the *prochein amy* of an infant; and it seems that even a person who has been outlawed in a civil action may fill that character, (r) although a *prochein amy* cannot, as we have seen, sue in *formâ pauperis*. (s)

It is stated in some of the books that a *prochein amy* must be a *responsible person*, (t) or a person of substance, on account of costs, but the better opinion seems to be, that it is not necessary that he should be so, (u) It certainly does not appear that the Court has ever gone to the extent of removing the *prochein amy* of an infant, or of staying proceedings in the suit, on the mere ground of his supposed poverty; and Lord Thurlow, upon an application for that purpose being made to him, is reported to have said that he doubted whether a next friend ought to be discharged on account of poverty more than a principal. "The principle," observes his Lordship, "upon which a plaintiff, if poor, would not be deprived of the opportunity of applying to the Court for justice, is similar to that of getting a next friend to sue. Suppose an infant had a father, who is the natural friend, to sue for him, would the Court refuse to hear that father." (x) In *Squirrell v. Squirrell* (y) (which seems to be a report of the same case as that above referred to, though it is somewhat differently stated) the application appears to have been, that the *prochein amy* [*104] *should give security to answer costs: and Lord Thurlow, acting upon the opinion of Mr. Dickens the Registrar, denied the motion. It appears to have been argued at the bar, in that case, that the application was analogous to a motion that a plaintiff out of the jurisdiction may give security to answer costs; but in answer to that it was said by Mr. Dickens, whose reasons appear to have been adopted by Lord Thurlow, that "the order which directs security to be given, states the plaintiff to live out of the jurisdiction of the Court, consequently the Court cannot enforce a duty; but in the case before the Court it is not supposed that a *prochein amy* is out of the reach of the process of the Court; therefore the defendant has a double remedy; he may attach and hold his person, and also sequester what property he may possess; the former to answer the contempt, the latter *ad satisfaciendum*."

It is certainly stated in a book of considerable authority upon the practice of the Court of Chancery, viz: the Practical Register, (z) that where a suit was by *prochein amy* not sufficient to answer costs, the Court ordered that another should be named; but it is not stated whether the bill was filed on behalf of an infant, or of a married women, between whose cases there exists in this respect a very important distinction, arising from the circumstance that a suit on behalf of an infant may be filed by any one for the infant's benefit, whereas the suit of

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(p) *Per* Lord Thurlow, Wall v. Rushby, 1 Bro. C. C. 487.
(q) Hawkins v. Luscombe, 2 Swanst. 392.
(r) Gilb. For. Rem. 54.
(s) *Supra*.
(t) Lord Red. 21; 1 Stra. 708.
(u) Davenport v. Davenport, 1 S. & S. 101.
(x) Anon. 1 Ves. J. 409.
(y) 2 Dick. 765.
(z) Ed. Wyatt, 349.

a *feme covert* is substantially her own suit, and her next friend is selected by herself, and is appointed for the express purpose of answering the costs, which cannot be recovered against a married woman by any process. Upon this ground, where the next friend of a *feme covert*, after the bill had been filed, and the answer put in, had taken the benefit of the Insolvent Act, but was detained in prison, and had applied for and obtained an order for the payment of his groats by the husband, the Vice Chancellor, (Sir J. Leach) although he refused a motion that the *prochein amy* might be removed and a new next friend appointed in his place, because the application was informal, said that the defendant might apply to stay all proceedings in the cause till the next friend was changed and security was given for the costs; but that he should hesitate very much *before he called upon the next friend of an infant to give security for costs. (a) [*105]

If the next friend of an infant does not do his duty, or if any other sufficient ground be made out, the Court will order him to be removed. (b) Thus, when the next friend will not proceed with the cause, the Court will change him. (c)

And although a next friend may not have been actually guilty of any impropriety or misconduct, yet if he is connected with the defendants in the cause in such a manner as to render it improbable that the interest of the plaintiff will not be properly supported, the Court will remove such next friend and appoint another in his place. Thus, where it appeared by the affidavit that the next friend was a person in low circumstances, that he was the brother of the plaintiff's father, and had been a material witness for him in a cause in the Ecclesiastical Court, in which the father had endeavoured to set aside the instrument under which the plaintiffs claimed; and that the interests of the father and of the infants were directly adverse to each other, the Vice Chancellor made an order to remove him from being the next friend of the infants, and referred it to the Master to appoint a proper person to be their next friend in his place. His Honor, also, said that if it could be tendered to him by affidavit, that a man of substance, who was himself wholly unconnected with the parties, and who would employ a solicitor similarly situated, was willing to undertake the office of next friend, he should have no hesitation in making the order immediately, and without any reference to the Master. (d)

In the same case it appeared that the solicitor for the infants acted for the father also, and had been for ten years his confidential solicitor; and the Vice Chancellor said, that although he was warranted by high authority in saying that in family suits it was proper that the same solicitor should be employed for all parties; yet the Court will watch with great jealousy a solicitor who takes upon himself a double responsibility, and if it sees a chance of his miscarrying, will take *care where the plaintiffs are infants, that he shall not stand in that relation to a defendant under circumstances of very adverse interest; and, upon this ground, his Honor decided that the solicitor for the father ought not to continue in the character of solicitor of the next friend. (e) [*106]

It may be here remarked, that the *prochein amy* of an infant cannot be permitted to act as receiver in the cause; and that where an application was made on behalf of infant plaintiffs, that the next friend might be at liberty to go before the Master, and propose himself to be the receiver, Sir Thomas Plumer, V. C., refused to accede to the motion, although it was consented to, observing that it was the duty of the next friend to watch the accounts and conduct of the

(a) Pennington v. Alvin, 1 S. & S. 264.
(b) Russell v. Sharp, 1 Jac. & W. 482.
(c) Ward v. Ward, 3 Mer. 706.
(d) Peyton v. Bond, 1 Sim. 391.
(e) Peyton v. Bond, 1 Sim. 392.

receiver, to be a control over him; and that the two characters were incompatible, and could not be united. (*f*)

If the next friend of an infant takes any proceeding in the cause which is incompatible with the advancement of the suit, such as moving to discharge an attachment issued by the solicitor in the regular progress of the cause, the Court will refer it to the Master to see if it is fit that such next friend should continue in that capacity any longer. (*g*) But as long as the next friend continues such on the record, he is considered by the Court as responsible for the conduct of the cause, and for this reason the Master of the Rolls, (Sir T. Plumer) on a petition being presented to him on the part of the infant plaintiff, complaining of great delay in prosecuting the decree, refused to refer it to the Master to inquire into the cause of the delay, and to appoint proper persons on behalf of the infant to assist in taking the accounts, saying that if there had been misconduct, he would assist the petitioner, but that it must be in a regular way. (*h*)

The next friend of an infant plaintiff is considered as so far interested in the event of the suit, that neither he nor his wife can be examined as a witness. (*i*) If their examination is necessary for the purposes of justice, his name must be struck out of the bill, and that of another person substituted; which, upon application, will be permitted. But it has been determined that in such case (*k*) [*107] the next friend who retires *must give security for the costs incurred in his time. (*l*) In the case of *Davenport* v. *Davenport*, (*m*) where this rule was recognized and acted upon, the Vice Chancellor ordered that the new next friend who was proposed in the notice of motion should be substituted in the room of the one to be withdrawn, although it was alleged that he was in indigent circumstances, and an inquiry was asked for as to whether he was a proper person to act in that capacity with a view to his circumstances, his Honor stating as his reason for refusing such inquiry, that he would be at liberty to file a new bill without such inquiry.

In *Melling* v. *Melling* (*n*) Sir John Leach, V. C., refused to allow another next friend to be substituted for the one who had up to that time conducted the suit in that capacity, and who desired to withdraw himself, without a previous reference to the Master, to inquire whether it was for the benefit of the infant that such substitution should take place, with liberty to state special circumstances, "as it might be that the suit was improper, or had been improperly conducted; and the next friend was not thus to escape from costs to which he might be liable."

When the *prochein amy* of an infant dies pending the suit, (*o*) the proper course of proceeding appears to be for the solicitor of the plaintiff to apply to the Court for leave to appoint a new *prochein amy* in his stead; and after such appointment the name of the new *prochein amy* should be made use of in all subsequent proceedings, where the former one, if alive, would have been named. If the plaintiff's solicitor omits to take this step within a reasonable time, the Court will, upon motion or petition, make an order upon the plaintiff's solicitor to name a new *prochein amy* within a given time, and that on default, it may be referred to the Master to appoint a next friend. An order of this description was made in *Lancaster* v. *Thornton*, (*p*) on the authority of a like order by Lord Hardwicke, (*q*) and the precedent has since been followed

(*f*) Stone v. Wishart, 2 Mad. 64.
(*h*) Russel v. Sharp, *ubi supra*.
(*k*) Lord Red. 21.
(*m*) 1 S. & S. 101.
(*o*) Gilb. For. Rom. 54.
(*q*) Ludolph v. Saxby, ibid.
(*g*) Ward v. Ward, 3 Mer. 706.
(*i*) Head v. Head, 3 Atk. 511.
(*l*) Witts v. Campbell, 12 Ves. 493.
(*n*) 4 Mad. 261.
(*p*) Amb. 398; 1 Dick. 346, S. C.

by *Sir John Leach, in *Bracey* v. *Sandiford.* (r) In the case of *Lancaster* v. *Thornton*, Sir Thomas Clarke, M. R., refused to [*108] make such an order without directing an attendance, although it had been done in the case before Lord Hardwicke; and it is to be observed, that, in the cases cited, the *prochein amy* died after the decree; but from a case mentioned in the note to the report of *Lancaster* v. *Thornton*, in Ambler, it appears that a like order was made by Sir Thomas Sewell, where the *prochein amy* had died before the decree. (s)

Where a bill has been filed in the name of an infant, his coming of age is no abatement of the suit; (t) but he may elect whether he will proceed with it or not. If he goes on with the cause, all future proceedings may be carried on in his own name, and the bill need not be amended or altered. (u) He will also be liable to all the costs of the suit, in the same manner that he would have been had he been of age when the bill was originally filed. (x) If he chooses to abandon it, he may move to dismiss it on payment of costs by himself; but he cannot compel the *prochein amy* to pay the costs unless it be established that the bill was improperly filed. Thus, where an infant, on attaining twenty-one, moved to dismiss a bill filed on his behalf, with costs to be paid by the *prochein amy*, the Court refused to make the order, but directed the bill to be dismissed on the late infant plaintiff giving an undertaking to pay the costs of the next friend. (y)

If, however, the next friend of an infant should die during the minority of the plaintiff, who, after he comes of age, should take no step in the cause, and the defendant should bring the cause on again, and procure the bill to be dismissed; such dismissal must be without costs, because the plaintiff not having been liable to costs during his infancy, and never having made himself responsible by taking any step in the cause *after attaining twenty-one, [*109] and there being no next friend to be responsible for them, there is no person against whom the Court can make an order for payment of costs. This point was decided by Lord King in *Turner* v. *Turner* (z) upon a rehearing, although, on the former hearing, his Lordship was of a different opinion. (a)

In that case the *prochein amy*, if living, would, of course, have been liable to the payment of the costs to the defendant, the general rule being that the *prochein amy* shall pay the defendant's costs of dismissing the plaintiff's bill; and so if a motion is made on behalf of an infant plaintiff which is refused with costs, such costs must be paid by the *prochein amy*. (b)

But the rule that a *prochein amy* is to be liable to the costs of dismissing a bill, or of an unsuccessful motion, is to be considered only with reference to his situation with regard to the defendant in the cause. For the Court is extremely anxious to encourage, to every possible extent, whoever will stand forward in the character of *prochein amy* on behalf of infants, (c) and will therefore, wherever it can be done, allow the next friend the costs of any proceeding instituted by him for the infant's benefit, out of the infant's estate, provided

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(r) 2 Mad. 468.
(s) Countess of Shelburne v. Ld. Inchiquin, Amb. 398, n.
(t) Prac. Reg. 225.
(u) Moor. 42; Prac. Reg. 225; 1 Fowler, E. P. 421.
(x) Cowp. E. P.
(y) It is apprehended that the Court in this instance meant that the infant could not compel the *prochein amy* to pay the costs. The infant not being answerable for the costs, was not injured by the institution of the suit. The *prochein amy*, therefore, was not answerable to the infant, but only to the defendant. Beames on Costs, 111, n. 15.
(z) 1 Stra. 708.
(a) 2 P. Wms. 297.
(b) Buckley v. Buckeridge, 1 Dick, 395.
(c) Whittaker v. Marlar, 1 Cox, 286.

he appears to have acted *bonâ fide* for the benefit of the infant. Therefore where a suit was instituted on behalf of an infant, in which there was a decree made, under which the money recovered was brought into Court, and put out for the benefit of the infant plaintiff, and the defendant was ordered to pay the costs, but ran away; upon a motion by the solicitor of the plaintiff (in which the father who was the *prochein amy*, and very poor joined) that his costs might be paid out the fund in Court, Lord King granted the motion, but with some reluctance. (*d*) And in another case when a supplemental bill had been filed on behalf of an infant, for which there were apparent grounds, but which was eventually dismissed as against one of the defendants with costs, which were paid by the receiver in the original cause; upon a petition by the *prochein amy* to be allowed such costs out of the infant's estate in the original [*110] cause, Lord *Hardwicke made the order, observing that the next friend and the receiver had done nothing but what any man would do in his own case; and that though it had turned out unfortunately, the Court would not say that they ought to bear the costs; as if they were, nobody would undertake the management of an estate for an infant. (*e*)

It is to be observed, that in the above case, after the supplemental bill had been filed, and the answer had come in, an application had been made on the part of the plaintiff in the original cause to refer it to the Master to inquire whether it was for the benefit of the infant to proceed in the suit, upon which the Master had reported that it wonld be for the benefit of the infant to carry it on against all the defendants; and that in pronouncing his judgment, Lord Hardwicke said that he had known bills to establish the custom of manors, in which it had been referred to the Master to inquire whether it was for the infant's benefit to carry it on. (*f*) It seems, however, from the case of *Jones* v. *Powell*, (*g*) before referred to, that applications on the part of the next friend for a reference to the Master to inquire whether a suit which such friend has instituted was for the infant's benefit, cannot be made in the suit, respecting which the reference is sought; but that the *prochein amy* must carry it on at his own risk, which appears to be a proper restraint to prevent suits of this description from being rashly undertaken; for as on the one hand the *prochein amy*, in case a fund should be recovered by means of the suit, has, through his solicitor's lien for his costs upon that fund, (*h*) an adequate protection from losing the charge he may have been put to by means of the suit, so the risk which he runs of losing those costs, in case the suit should be unsuccessful, tends to make persons cautious in undertaking proceedings of this nature on behalf of infants without having very good reason for anticipating a successful result.

It is to be observed, however, that although the Court will so far encourage persons acting fairly or *bonâ fide* to institute proceedings on behalf of infants, [*111] or to protect them when it is *possible so to do from all costs and expenses which they may incur by such step, a protection which it will not suffer *any degree of mistake or misapprehension* to deprive him of, (*i*) yet if it should turn out that he has acted from improper motives, or merely to answer the purposes of spleen, the principle which guides the Court in encouraging an honest *prochein amy*, *i. e.* the anxiety to have affairs of infants properly taken care of, will involve a *dishonest* one in the expenses of his own proceeding. (*k*) And so if it should appear that in the case of an infant, due diligence has not been exerted to acquire a proper knowledge of the

(*d*) Staines v. Maddox, Mos. 319.
(*f*) Ibid. 469.
(*h*) Staines v. Maddox, Mos. 319.
(*k*) Ibid.
(*e*) Taner v. Ivie, 2 Ves. 466.
(*g*) 2 Mer. 141.
(*i*) Whittaker v. Marlar, 1 Cox, 286.

facts of the case, and the bill should be dismissed or an order discharged upon facts, which though not known when the bill was filed or the motion made, might have been known if proper inquiry had been made, the next friend will not be allowed the costs out of the infant's estate. (*l*) Thus where it appeared that a writ of *Ne exeat Regno* had been improperly obtained by the next friend, on motion supported by the affidavit of the infant plaintiff, by which the infant, who was of the age of eighteen years, swore positively to facts, which it appeared he could not have known himself, but which he could only have been told by other persons, the Lord Chancellor (Lord Thurlow) discharged the order, and directed that the *prochein amy* should pay the costs of obtaining it. (*m*)

There appears to be no doubt that a solicitor conducting a cause on the part of an infant, has the same lien upon the money recovered in the suit by his means, and at his expense, as he has in the case of an adult; (*n*) and therefore if the suit is successful, the *prochein amy* is in general secure from being put to any charges on the infant's behalf. But it seems that a solicitor who obtains possession of papers, as *prochein amy*, has not any lien upon them by virtue of such possession. (*o*)

It is said that where a legacy is given to an infant, the testator makes it necessary to come into this Court for directions how to lay it out; and that therefore such an application ought to be considered as an incumbrance on the estate; and that the *costs must be paid out of the assets. This rule was acted upon in *Whapham* v. *Wingfield*, (*p*) by Sir W. Grant, who [*112] said that if the testator wishes to prevent the costs of such a suit from coming out of his estate, he ought to give the legacy to a trustee for the infant. (*q*) His Honor, however, said that for the future he should not give the costs in such a case, for since the late Legacy Act, 36 Geo. 3, c. 52, s. 32, the executor has nothing to do but, under that Act, to pay the legacy into court, and then he has done; and the infant, when he comes of age, may petition for it. Before that Act an executor could not safely pay an infant's legacy without a decree.

It is presumed that the rule above laid down will not apply so as to prevent an infant legatee from receiving his costs, in case he is obliged to file a bill in consequence of the executor's omitting to avail himself of the Act to pay the money into Court, since there is no power given by the Act by which the executor can be compelled to pay the legacy without a suit. All that Sir W. Grant's *dictum* can mean is, that the expense of the suit shall not be thrown upon the residuary estate.

With respect to the right of the next friend of an infant to receive anything beyond his taxed costs out of a general fund, in order to reimburse him for any extra expense he may have been put to, some difference of opinion appears to have existed between Lord Eldon and Sir W. Grant. In *Osborne* v. *Denne*, (*r*) where a bill had been filed on behalf of an infant legatee and other plaintiffs, in which the usual decree was made, and the costs ordered to be taxed and paid out of the estate, an application was made to the Master of the Rolls on behalf of the *prochein amy*, that he might in some way have costs beyond his taxed costs, either by a direction to have them taxed as between solicitor and client, or by a reference to the Master to see what extra costs he had been put to; but the Master of the Rolls refused to make the order, saying that if a *prochein amy* is to a certainty to have all that exceeds the taxed costs, it would lead him to be very careless. But in *Fearns* v. *Young*, (*s*) where an application had

(*l*) Pearce v. Pearce, 9 Ves. 548.
(*n*) Staines v. Maddox, Mos. 319.
(*p*) Anon. Mos. 5.
(*r*) 7 Ves. 424.
(*m*) Roddam v. Hetherington, 5 Ves. 91.
(*o*) Montagu on Lien, 53.
(*q*) 4 Ves. 630.
(*s*) 10 Ves. 184.

been made to the Lord Chancellor for the costs of trustees, as between solicitor [*113] and *client, his Lordship refused to make such an order, on the ground that where the costs of a trustee are directed to be taxed, that means as between party and party, not in the larger way, although where a trustee, in the fair execution of his trust, has expended money by reasonably and properly taking opinions, and procuring directions that are necessary for the due execution of his trust, he is entitled not only to his costs, but also to his charges and expenses, under the head of just allowances. "*With regard to an infant,*" his Lordship said, "*this requires great consideration, for as the infant himself cannot incur charges and expenses, if they cannot be claimed under just allowances, and the next friend is to be at the whole expense of the infant beyond his costs, persons will deliberate before they accept that office.* (*t*)

SECTION II.

Idiots, Lunatics and Persons of Weak Minds.

It has been before observed, that although in certain cases suits on behalf of idiots or lunatics may be instituted in the form of informations by the Attorney General, yet the proper course of proceeding to assert their rights in equity is by bill.

Bills on behalf of a lunatic are usually instituted in the name of the lunatic; but as he is a person incapable in law of taking any step on his own account, he sues by the committee of his estate, who is responsible for the conduct of the suit. The lunatic, however, must be named a party, as well in a bill as in an information on his behalf, unless the object of the suit be to avoid some transaction entered into by himself on the ground of his incapacity at the time, in which case, it seems, that a lunatic ought not to be a co-plaintiff, because it is a principle of law that no man can be heard to stultify himself. This distinction was taken in the case of the *Attorney General* v. *Woolrich*, (*a*) which [*114] was the case of a bill, in the nature of an information, filed by the *Attorney General, for the benefit of a lunatic, to obtain the benefit of a marriage settlement entered into by him before his lunacy: to this bill the defendant demurred, on the ground that the lunatic was not a party to it, and the demurrer was allowed, the Lord Keeper (Bridgman) declaring it was as needful to make the lunatic a party, where a suit was on his behalf as an infant; and a distinction is pointed out by the reporter between that case and the preceding case of Smith, (*c*) in the same volume. "Smith's case was to be relieved against an act done by the lunatic in assigning a debt, because he was a lunatic at the time, so that if he had been a party, it would have been to stultify himself, which the law does not admit. (*d*) In *Woolrich's* case the bill was to be relieved upon a marriage settlement, for the benefit of the lunatic before he was a lunatic; so that he being a party to that bill did not tend to stultify himself, and may be the reason why he should be a party to it; and the other bill tending to stultify himself, may be a reason why he should not be a party to it." (*e*)

It is to be observed, however, that where a bill is brought by a lunatic and his committee, to avoid an act of the lunatic's on the ground of insanity, a demurrer, on the ground that a lunatic could not be allowed to stultify himself,

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(*t*) Fearns v. Young, 10 Ves. 184.
(*a*) 1 Cha. C. 153.
(*c*) Attorney General v. Parkhurst, 1 Cha. Ca. 112.
(*d*) *Vide* Beverley's case, 4 Rep.
(*e*) Ridler v. Ridler, 1 Eq. Ca. Ab. 279.

will not lie. This was decided by Lord King in *Ridler* v. *Ridler*, (*f*) in which case a bill was brought by a lunatic and his committee, to set aside a settlement which had been obtained from him by the defendant before the issuing out of the commission of lunacy, but subsequently to the time when by the commission he was found to have been a lunatic, and the bill charged several acts of insanity and distraction previous to the making of the settlement and the issuing out of the commission, and charged likewise that the commission of lunacy was still in force. To this bill the defendant demurred, on the ground that it was against a known maxim of law that any person should be admitted to stultify himself, and because during the continuance of the lunacy he could not be supposed to know what he did; *but the Lord Chancellor overruled the demurrer, and said that the rule that a lunatic should not be admitted to [*115] excuse himself on pretence of lunacy, was to be understood of acts done by the lunatic to the prejudice of others, but not of acts done by him to the prejudice of himself; "Besides," his Lordship observed, "here the committee is likewise plaintiff, and the several charges of lunacy are by him in behalf of the lunatic; and it has been always held, that the defendant must answer in that case."

It was said by the Lord Keeper Bridgman in the case of *Attorney General* v. *Woolrich*, above referred to, that the reason why a lunatic is required to be a party to a suit instituted on his behalf, is because he may recover his understanding, and then he is to have his estate in his own disposition; but that it is otherwise of an idiot, from which it seems that an idiot is not a necessary party to a suit instituted on his behalf. But neither an idiot nor a lunatic can institute a suit, nor can one be instituted on their behalf, without the committee being a party, either as a co-plaintiff or as a defendant; (*g*) and therefore, where the committee of a lunatic filed a bill on behalf of the lunatic without making himself a co-plaintiff, Sir Thomas Plumer, M. R., decreed the case to stand over, with liberty to amend, by making the committee a co-plaintiff; (*h*) and in the *Bishop of London* v. *Nicholls*, (*i*) a bill for tithes by the Bishop and sequestrator during the incapacity of the incumbent, was dismissed, because the incumbent and his committee were not parties.

If a person exhibiting a bill appear upon the face of it to be either an idiot or a lunatic, and therefore incapable of instituting a suit alone, and no next friend or committee is named in the bill, the defendant may demur; (*k*) but if the incapacity does not appear on the face of the bill, the defendant must take advantage of it by plea. (*l*) The objection arising from lunacy, &c. extends to the whole bill; and advantage may be taken of it, as well in the case of a bill for discovery merely, as in the case of a bill for relief; for the defendant, in a bill of discovery, being entitled *to costs, after a full answer, [*116] as a matter of course, would be materially injured by being compelled to answer such a bill by a person whose property is not in his own disposal, and who is therefore incapable of paying the costs. (*m*)

If the plaintiff become a lunatic after the institution of a suit, a supplemental bill may be filed in the joint names of the lunatic and of the committee of his estate, which will answer the same purpose as a bill of revivor in procuring the benefit of former proceedings. (*n*) And if the committee of a lunatic's or idiot's estate die, after a suit has been instituted by him for the benefit of the

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(*f*) *Ubi supra.*
(*g*) Fuller v. Lane, 1 Cha. Ca. 19.
(*h*) Woolfryes v. Woolfryes, Rolls. Feb. 17, 1824, MSS.
(*i*) Bunb. 141.
(*k*) 1 Cha. Ca. 19; Ld. Red. 153, 4th ed.
(*l*) Lord Red. 229, 4th ed.
(*m*) Lord Red. 152, 4th ed.
(*n*) See Brown v. Clark, 3 Wooddeson Lect. 378, *notis*, where the form of such a bill is stated.

idiot or lunatic, and a new committee is appointed, the proper way of continuing the suit is by a supplemental bill filed by the idiot or lunatic and the new committee.

A committee ought, previously to instituting a suit on behalf of an idiot or lunatic, to obtain the sanction of the Lord Chancellor to the proceeding, by a petition under the commission; and it is usual upon such petition being heard to refer it to the Master to inquire into the nature of the right or interest of the idiot or lunatic in the property claimed, and to certify whether any proceedings should be adopted for recovering it or for ascertaining his rights. (*o*) If the Master reports that it will be proper a suit should be instituted, the committee will be ordered, in the name and on behalf of the lunatic, to file a bill in Chancery, or to take such other proceedings as the nature of the case may require. (*p*)

It may be observed here, that the Court of Chancery will not, as a matter of course, interfere to set aside contracts entered into and completed by a lunatic, without fraud in the parties dealing with him, even where such contracts are overreached by the inquisition taken in lunacy, and may be void at law; but the interference of the Court will depend very much upon the circumstances of each particular case; and where it is impossible to exercise the jurisdiction in favour of the lunatic so as to do justice to the other party, the Court will [*117] refuse relief, *and leave the lunatic to his remedy, if any, at law. (*q*) It seems also, that although a contract is entered into by a lunatic subsequent to the date from which he is found by the inquisition to have become lunatic, yet if the fact of his being a lunatic at the time of the contract is denied by the defendant, the establishment of that fact is indispensably necessary; and if the Court has any doubt upon it, it will direct an issue to try it. (*r*)

Persons of full age but who are incapable of acting for themselves, though neither idiots nor lunatics, have been permitted to sue by their next friend without the intervention of the Attorney General; (*s*) and it seems, that if a bill has been filed in the name of a plaintiff who, at the time of filling it, is in a state of mental incapacity, it may, on motion, be taken off the file. (*t*) If, however, a suit has been properly instituted, and the plaintiff subsequently becomes *imbecile*, that circumstance will not be a sufficient ground for taking the bill off the file. Thus, where a motion was made on the part of the defendant to take a bill off the file, on the ground of the plaintiff having been for some time reduced by age and infirmity to a state of mental imbecility, which rendered her incapable of instituting a suit; but the circumstances of the case did not, in the opinion of Lord Eldon, warrant the inference that at the time of filing the bill she was incompetent to authorize the proceeding, and as the bill appeared to be a proper one with a view to her rights and interests, his Lordship thought, that as the suit was rightly commenced and the further prosecution of it proper, it would be a strong step even to stay the proceedings, merely because her state of mind was such that she could not revoke the authority previously given, but that to take the bill off the file and make the answer waste paper could not be done. (*u*)

(*o*) *In re* Reynolds, Shelf on Lun. 417.

(*p*) *In re* Webb; *In re* Sir T. Smith; *In re* Frank, ibid.

(*q*) Shelf on Lun. 418. (*r*) Niell v. Morley, 9 Ves. 478.

(*s*) Lord Red. 23, cites Elizabeth Liney, a person deaf and dumb by her next friend, against Witherly and others, in Ch. Dec. 1 Dec. 1760. Ditto on Supplem. Bill, 4 Mar. 1779.

(*t*) Wartnarby v. Wartnarby, Jac. 377. (*u*) Ibid.

*SECTION III. [*118]

Married Women.

By marriage the husband and wife become as one person in law, and upon this union depends all the legal and equitable rights and disabilities, which either of them acquires or incurs by the intermarriage. One of the consequences of this unity of existence and interest between the husband and wife is, that at common law a married woman cannot, in any case during the continuance of her coverture, institute a suit alone; therefore, whenever it is necessary to apply to a judicial tribunal respecting her rights, the proceeding must be commenced and carried on in their joint names. This rule is invariable in courts of ordinary jurisdiction, unless when the husband can be considered as *civiliter mortuus*, in which case the wife is looked upon as restored to her rights and capacity as a *feme sole*, and may sue alone.

With respect to what is called a civil death in law, Lord Coke says that a deportation for ever into a foreign land, like to a profession, is a civil death, and that in such cases the wife may bring an action, or may be impleaded during the natural life of her husband; and so, if by an Act of Parliament the husband be attainted of treason or felony, and saving his life is banished for ever, this is a civil death, and the wife may sue as a *feme sole;* but if the husband have judgment to be exiled but for a time, which some call a *relegation*, this is no civil death. (*a*)

At law also, every person who is attainted by ordinary process of high treason, petit treason, or felony, is disabled to bring any action, for he is *extra legem positus*, and is accounted in law *civiliter mortuus;* (*b*) and where the husband is an alien, and has left this kingdom, or has never been in this country, the wife may during such absence sue alone, (*c*) although in ordinary cases the *absence of the husband affords no ground for a wife's proceeding separately. (*d*) In these respects Courts of Equity follow [*119] the rules of law. Thus it has been held in equity, that where a husband has been banished for life by Act of Parliament, the wife may in all things act as a *feme sole*, as if her husband were dead, and that the necessity of the case requires that she should have such power; (*e*) and where a husband was attainted of felony and pardoned on condition of transportation, and afterwards the wife became entitled to some personal estate as orphan to a freeman of London, such personal estate was decreed to the wife as a *feme sole.* (*f*)

In equity, however, as well as at law, the general rule which requires the husband to be joined in a suit respecting the rights of his wife, prevails, except under particular circumstances, which will be hereafter pointed out; but at law, there exists a distinction between actions for property which has accrued to the wife before marriage, and actions for property which has come to her afterwards, which distinction does not appear to prevail in equity. For with respect to such debts and other *choses in action* as belong to the wife and con-

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(*a*) Co. Lit. 132.

(*b*) 4 T. R. 361; 2 B. & P. 165; 4 Esp. Rep. 27; 1 Selw. N. P. 6 ed. 628; Cro. Car. 519, 145; Bac. Ab. tit. Bar. & Feme [M.]; 9 East, 472.

(*c*) 2 Esp. 554, 587; 1 B. & P. 357; 2 B. & P. 226; 1 N. R. 80; 11 East, 301; 3 Camp. 123; 5 T. R. 679, 682.

(*d*) 11 East, 301.

(*e*) Countess of Portland v. Prodgers, 2 Vern. 104; S. C. Eq. Ca. Ab. 171, Pl. 1.

(*f*) Newsome v. Bowyer, 3 P. Wms. 37.

tinue unaltered, since the husband cannot disagree to her interest in them, and as he has only a qualified right to possess them, by reducing them into possession during her life; he is unable to maintain an action for such property without making his wife a party; (g) but for all personal estate which accrues to the wife, or to the husband and wife *jointly* during marriage, and for all covenants made or entered into with them during that period, the husband may, at law, commence proceedings in his own name; because the right of action having accrued *after* marriage, the husband may disagree as to his wife's interest and make his own absolute, an intention to do which he manifests in bringing an action in his own name, when it might have been commenced in the name of both of them: (h) and in such case, it has been held, that if the husband recover a judgment for a debt due to the wife, and die before execution, his [*120] personal *representative will be entitled to the benefit of it, and not the wife. (i) The distinction above pointed out does not, however, as has been stated, appear to exist in Courts of Equity, where it seems necessary that in all cases where the property sought to be recovered is the property of the wife, she should be a party co-plaintiff with the husband, whether the right to the property accrued before or after marriage. Thus in *Clarke* v. *Lord Angier*, (k) where a legacy was given to a *feme* whilst she was covert, and the husband without her exhibited a bill for it, to which the defendant demurred, on the ground that the wife ought to have been joined in the suit, the demurrer was allowed; (l) and the Court has even gone the length of granting an injunction to stay proceedings in the Ecclesiastical Court, in a suit instituted there by a husband alone, to obtain a legacy bequeathed to his wife. (m)

The ground upon which Courts of Equity require the wife to be joined as co-plaintiff with her husband in suits relating to her own property is, the parental care which such Courts exercise over those individuals who are not in a situation to take care of their own rights; and as it is presumed that a father would not marry his daughter without insisting upon some settlement upon her, so those Courts, standing *in loco parentis*, will not suffer a husband to take a wife's portion until he has agreed to make a reasonable provision for her, (n) or till it has given the wife an opportunity of making her election, whether the property shall go to her husband or shall be made the subject of a settlement [*121] upon her and her children. *Upon this principle it is, that where a sum of money is declared by the decree or order of the Court to belong to a married woman, the Court will not suffer it to be paid over to the husband till the wife has been examined apart from him, to ascertain whether such payment is to be made by her consent, or whether she is willing to have a settlement of the money made upon her and her children. (o) It is therefore

(g) 1 Roper on Husband and Wife, 211, and the cases there cited *notis*.
(h) Ibid. 210.
(i) Oglander v. Batson, 1 Vern. 396; Garforth v. Bradley, 2 Ves. 677.
(k) 2 Freeman, 160; 1 Chs. Ca. 61; Nels. 78.
(l) *Vide etiam* Blount v. Bestland, 5 Ves. 515.
(m) Anon. 1 Atk. 491; Meales v. Meales, 5 Ves. 517, note. From what was said by the Master of the Rolls in Carr v. Taylor, 10 Ves. 580, some doubt appears to have existed in his Honor's mind as to the application of the rule which requires a wife to be joined in all suits instituted by her husband for the recovery of her property, to cases where the property sought to be recovered is merely a *legal chose in action*, accrued to the wife after marriage, and for which the husband might, at law, maintain a suit alone, but is obliged to resort to a Court of Equity for the purpose of removing some legal impediments, or of obtaining the benefit of an account. With great deference, however, to so high an authority, it is submitted, that such a distinction does not exist, since the right of a wife to a settlement, which is the foundation of the rule which requires the wife to be joined, applies to all cases where the wife's estate is concerned, whether legal or equitable.
(n) 2 Atk. 420.
(o) Elliott v. Cordell, 5 Mad. 156.

the constant practice of the Court, where the object of the suit or of an interlocutory application is money or stock belonging to a married woman, if the wife be resident in town, for the judge, to whom the application is made, to take her examination in Court apart from her husband at the time when the order for payment is pronounced. (*p*) If the woman be resident in the country, a commission will be directed to commissioners for the purpose of taking her examination, (*q*) and the order for this commission may be either inserted in the decree, or made the subject of a distinct order upon motion or petition. (*r*) Under such commission the married woman is to be examined by the commissioners, or such number of them as are mentioned in the commission, separate and apart from her husband; and her examination must be taken down in writing and signed by her and the commissioners, who then certify to the Court the execution by them of the commission. Upon this being done, the commission, with the certificate and examination, is returned to the Court by the commissioners, and in the subsequent application to the Court to have the money paid to the husband agreeably to the wife's consent, the signatures of the commissioners to the certificate and examination, and of the wife to the latter, must be verified by affidavit. (*s*)

Where the wife is resident abroad, a similar commission to take her consent will be directed to persons resident there. (*t*) In *Minet* v. *Hyde* (*u*) the order was, that she should appear *before some of the plaintiffs and a magistrate of Breda, to be privately examined as to her consent, [*122] such examination to be in writing in the French or German language, and to be signed by her, and attested by notaries public, whose certificate thereof was also to be in writing either in the French or German language. It was also ordered that such signing and certificate should be verified by the affidavit of some credible witnesses either in the German or French language, before a proper magistrate of Leyden aforesaid; and that the examination, certificate, and affidavit, should be translated from the language in which they should be taken into the English language, by T. A. & R. R. of London, notaries public, or either of them; and that such of them as should translate the same should be sworn to the truth of such translation. (*x*)

It seems that where a wife's consent has been already given upon her examination before another competent tribunal, she need not be again examined in a Court of Equity; thus, in *Campbell* v. *French*, (*y*) Lord Loughborough did not think it necessary to issue a commission to take the examination of a married woman residing in America, as she appeared to have been examined under a commission issued by the Government of Virginia, and had consented to a power of attorney to receive the legacy which had been executed by her husband. And so it has been held, that where a married woman is entitled to a share of money arising from the sale or mortgage of an estate which has been mortgaged or sold, and in order to effect such sale or mortgage she has joined in levying a fine of her share, and for that purpose has undergone the usual

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(*p*) For a decree for payment to husband on consent of wife given in Court, *vide* Seton on Decrees, 255. For an *order* for ditto, *vide* Hand's Practice, 213.

(*q*) 1 Newl. 383.

(*r*) Grant's Practice, 367. For a precedent of such an order, *vide* Seton, 257; and for a return by commissioners to ditto, *vide* ib. 258, and Tasburgh's case, 1 V. & B. 507.

(*s*) 1 Newl. 384; Tasburgh's case, 1 V. & B. 507.

(*t*) Parsons v. Dunne, 2 Ves. 60. Bourdillon v. Adair, 3 Bro. 237.

(*u*) 2 Bro. C. C. 663.

(*x*) Ibid. Ed. Belt. p. 662, N. 1, *vide etiam* Parsons v. Dunne, Belt's Suppl. to Ves. 276.

(*y*) 3 Ves. 321.

examination in the court where such fine has been levied, she will be barred, by the fine, of her equity for a settlement. (z)

It may be observed here, that all applications for payment to the husband of money belonging to the wife, with the consent of the wife, must be supported by an affidavit that there is no settlement on the marriage, or that it does not [*123] affect the fund. (a) The Court also will not take the consent of the *wife till the amount of the fund is ascertained; (c) nor will it direct the payment where only part is ascertained, if any part remains unascertained. (d)

Formerly, where the sum exceeded 100*l.*, the consent of the wife could not be dispensed with, (e) but now, where the sum is under 200*l.*, or produces less than 10*l.* a-year, consent will be dispensed with; (f) and in *Foden* v. *Finney*, (g) where the wife's money in Court did not amount to 200*l.*, it was ordered to be paid to the husband, though the wife had been deserted by him, and opposed the application.

It may be mentioned in this place, that where a sum of stock was bequeathed to a married woman, whose husband was of unsound mind, though no commission of lunacy had been issued against him, the Court, on a bill filed on behalf of the husband and wife for payment of the legacy, ordered the fund to be transferred into Court to the joint account of the plaintiffs, and afterwards, in consideration of their poverty, made an order upon petition, that the dividends to become due, amounting to 20*l.* per annum, should be paid to the wife on her sole receipt, or to her solicitor, he undertaking to pay them over to the wife. (h)

By an order of the 16th Feb. 1816, (i) it is directed that where any sum is ordered to be paid, or is reported to be due to an unmarried woman, in case of her marriage before payment, where the sum does not amount to 200*l.*, or to the sum of 10*l.* in annual payments, upon affidavit of the husband and wife stating such marriage, and that no settlement or agreement for a settlement has been made affecting or relating to such sum, the Accountant General may make his draft for such money, payable either to the wife or to the husband. But in such a case where the sum in Court amounts to 200*l.* and upwards, the money cannot be paid out without an application to the Court, which also must be supported by an affidavit from the party that the money has not been the sub- [*124] ject of settlement. (k) This restriction, *however, applies only to applications for the capital, for where the interest only of a fund is ordered to be paid to a single woman who afterwards marries, the Accountant General may, even where the amount exceeds 10*l.* per annum, continue to make the payments to the husband; but in such case also it is necessary, that besides the usual affidavit of the marriage and identity of the party, there should be an affidavit that there was no settlement or agreement for a settlement. (l)

The wife, as we have seen, may, upon her examination in Court or before commissioners, waive her right to a settlement altogether, and give the property to her husband. In *Ex parte Higham*, (m) however, Lord Hardwicke appears to have considered himself entitled to object to the whole fund being paid over to the husband, who was in trade, even though the wife consented.

(z) May v. Roper, 4 Sim. 360.
(a) Minet v. Hyde, 2 Bro. C. C. 603.
(c) Sperling v. Rochfort, 8 Ves. 178; Woollands v. Crowcher, 12 Ves. 178; Jernegan v. Baxter, 6 Mad. 32.
(d) Godber v. Laurie, 10 Pri. 152.
(e) Bourdillon v. Adair, 3 Bro. 237.
(f) Elworthy v. Wickstead, 1 J. & W. 69.
(g) 4 Russ. 428.
(h) Steed v. Calley, 2 M. & K. 52.
(i) Beame's Ord. 464.
(k) Hough v. Ryley, 2 Cox, 157.
(l) Clayton v. Gresham, 10 Ves. 289.
(m) 2 Ves. 579.

But in *Willats* v. *Cay* (*n*) where the wife had appeared in Court, and being examined desired that the whole money might be paid to her husband, the Master of the Rolls, although the parties had married without the consent of the wife's relations, and the husband appeared to be insolvent, refused to refer it to the Master to consider a scheme for securing a provision for the wife, observing, that it was never done unless circumstances of fraud or of compulsion on the part of the husband appeared; and that a wife might as well dispose of her personal estate, over which she has an absolute control, as of real estate, which she might do by joining in a fine with her husband. (*o*)

But, although a wife may consent to waive her equity for a settlement out of her immediate personal property, yet where property has been settled to her use for life, and after her death to such persons as she should appoint by will, and in default of appointment to her executors, &c., she cannot, in her lifetime consent that the property should be given to her husband. (*p*)

*The rule of the Court appears to be, that the wife can only consent to depart with that interest which is the creature of a Court of Equity; viz: the right which she has in a Court of Equity to claim a provision by way of settlement on herself and children, out of the property which at law the husband could take possession of in her right. This equity arises upon the husband's legal right to present possession; and the principle has no application to a remainder or reversion, which can only be passed to the husband when it falls into possession. Upon this ground a petition, which had for its object the payment to the husband of a sum of money to which the wife was entitled in reversion after the death of her mother, was refused by Sir J. Leach, V. C., (*q*) his Honor observing, that if a wife by her consent could pass a remainder or reversion in personal property to the husband, she would not only part with a future possible equity, but with her chance of possessing the whole property by surviving her husband. "A Court of Equity," his Honor observed, "interferes to protect the property of the wife against the legal rights of the husband, and will never lend itself as an instrument to enable the husband to acquire a right in the wife's personal property which he can by no means acquire at law." [*125]

The same principle was acted upon by the Court in *Richards* v. *Chambers*, (*r*) and in *Ritchie* v. *Broadbent*. (*s*) In *Howard* v. *Damiani*, (*t*) however, a different order appears to have been made by Sir William Grant, M. R., but that was a mere order made by consent, and according to the opinion of Lord Lyndhurst in *Honor* v. *Morton*, (*u*) not to be relied upon. In *Macarmick* v. *Buller*, (*v*) however, Lord Kenyon, M. R., made an order, upon the consent of a married woman given in Court, for the payment of trust-money to her husband, which appears to be completely at variance with the rule laid down in the cases just cited. In that case, on the marriage of the plaintiff, a sum of 9,000*l.* had been vested in trustees upon trust to pay the interest to the husband for life, and after his *death to the wife for life, and upon the death of the survivor to pay the principal to such persons as such survivor should direct; but the husband having occasion for the money, joined with the wife in [*126]

(*n*) 2 Atk. 67.

(*o*) *Vide* acc. Milner v. Colmer, 2 P. Wms. 642; Lancy v. Athol, 2 Atk. 448; Oldham v. Hughes, 2 Atk. 452; Hearle v. Greenbank, 3 Atk. 709; Parsons v. Dunne, 2 Ves. 60; Anon. 2 Ves. 671; Minet v. Hyde, 2 Bro. C. C. 663; Dimmoch v. Atkinson, 3 Bro. 195; Ellis v. Atkinson, ib. 565; Hood v. Burlton, 4 Bro. C. C. 121.

(*p*) Socket v. Wray, 2 Atk. 6, n.

(*q*) Picard v. Roberts, 3 Mad. 384.

(*r*) 10 Ves. 580.

(*s*) 2 Jac. & W. 456; *Vide etiam* Woollands v. Crowcher, 12 Ves. 175; ib. 458, n.

(*t*) 2 Jac. & W. 258, n.

(*u*) 3 Russell, 63.

(*v*) 1 Cox, 357.

executing a deed-poll, whereby they appointed the money *immediately* to the husband, and upon personal examination of the wife in Court, the trustees were directed to pay the money to the husband, and to deliver up the settlement to be cancelled. In a recent case, where a *feme covert* was tenant in tail in remainder after a subsisting life estate of money to be laid out in land, it was held by Sir J. Leach, M. R., that she could by an arrangement with the tenant for life, and on a private examination under the 7 Geo. 4, c. 45, consent to the payment of a portion of the money to the husband. (*w*) But that the Act, it is to be remarked, gives to the tenant in tail in remainder an immediate right to apply, in concurrence with the tenant for life, for the payment of the money out of Court, so that the order so made under the Act is not at variance with the rule above noticed, that the wife can only consent to depart with that which the husband, in her right, has an immediate right to reduce into possession.

Where property is settled to the separate use of a married woman, her examination in Court is not necessary in order to pass her interest to a purchaser. The principle upon which this rule is founded is that she is, as to that property, a *feme sole*, and as such has a disposing power over it; and it applies as much to reversionary property as to property in possession. (*x*) Upon the same principle, where a married woman to whom an annuity was bequeathed for her separate use, joined with her husband in assigning part of it for a valuable consideration, and she, the husband, and the purchaser, afterwards filed a bill against the executors of the testator under whom the annuity is claimed, a doubt having occurred whether in such a case a decree could be taken by consent; the Master of the Rolls was of opinion that it could, and directed the decree to be drawn up accordingly. (*y*)

[*127] But although where property has been settled to the separate *use of a married woman, the Court will give effect to her alienation of such property, in the same manner that it gives effect to an alienation by a *feme sole*, the rule does not extend to transactions with her husband, which are looked upon by the Court with considerable jealousy, so much so, that it is very constantly the course where the trustees have obliged the party to come to the Court, not to establish a deed between the husband and wife disposing of the separate estate of the wife, without the actual presence of the wife.

Upon this principle the order in *Gullan* v. *Trimbey* (*z*) appears to have been made. In that case a sum of money had been bequeathed to a married woman, to be laid out by trustees in the purchase of an annuity for her life, to be settled to her separate use, but the testator's estate not being sufficient to pay the whole legacy, a smaller sum was apportioned to the legatee, and a petition was presented by the legatee and her husband, praying that the money might be paid to him, and an order to that effect was made, but not till the consent of the wife had been taken. It has not, however, been determined that a wife may not, in any case, dispose of her separate property to her husband, unless by consent in Court. Several instances have occurred where wives, by acts *in pais*, have parted with separate property to their husbands. (*a*) It should be observed, however, that such gifts are never to be inferred without very clear evidence. (*b*)

It may be remarked here, that if the wife is the subject of a foreign State, by the law of which her husband would be entitled to receive the whole of her

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(*w*) *In re* Silcock's Est. 3 Russ. 369.
(*x*) Sturgis v. Corp, 13 Ves. 190.
(*y*) Stinson v. Ashley, 5 Russ. 4.
(*z*) 2 Jac. & W. 457, n.
(*a*) Pawlet v. Delaval, 2 Ves. 669.
(*b*) Rich v. Cockell, 9 Ves. 369; Harvey v. Ashley, cited 2 Ves. 671; S. C. 3 Atk. 607; Harg. Co. Lit. 37 a. n.

property without making any provision for her, the Court will dispense with her consent, and will order the money to be paid to the husband without requiring any settlement. (c)

It is also to be observed, that if the wife be not of full age, she is incapable of giving her consent; in that case, therefore, the Court will not examine the wife, but will require the husband, in case he applies to this Court for her equitable property, *to make a proper settlement upon her. The Court, however, possesses no means of compelling a husband to [*128] make a settlement upon his wife out of her property in Court, if he does not seek to lay his hands upon the capital, unless in the case of his having committed a contempt by marrying a ward of Court. (d)

If a married woman, upon being examined apart from her husband, refuses to give her consent to the money being paid to her husband, the consequence of such refusal is a reference to one of the Masters of the Court to approve of a proper settlement to be made upon her and her children.

The right of a married woman to have a settlement made upon herself and her children out of her personal property, which is the subject of a suit in Equity, is totally distinct from her right by survivorship to such of her *choses in action* as have not been reduced into possession during the joint lives of herself and husband. The right by survivorship is a legal right, applying equally to her legal and equitable interest; but her right to a settlement depends upon the peculiar rule of Courts of Equity before alluded to, which standing in *loco parentis* with regard to a *feme covert*, will not suffer the husband to take the wife's portion until he has agreed to make a reasonable provision for her and her children, unless they are satisfied that it is with her free consent that it is paid over to him. (e) This rule of equity is not of modern adoption, but has been recognized and acted upon from a very early period. In the case of *Tanfield v. Devonport*, (f) which occurred in the 14 Chas. 1, Lord Keeper Coventry takes notice of it, and it has been acknowledged and followed in all subsequent cases, where a wife has had a demand in her own right, and application has been made to a Court of Equity to enforce it. (g) Where *however, the demand is not one which accrues to the husband in right [*129] of his wife, although he may be entitled to it under a contract made upon his marriage, yet if he alone has the right to sue for it, the equity of the wife to a settlement will not attach. Thus where, in contemplation of marriage, the father of the intended wife covenanted to pay 1,000*l.* to the husband on marriage, and also that his heirs, executors, &c., should, within six months after his death, pay the further sum of 500*l.* to the husband as the remainder of the wife's portion, it was held that the wife was not entitled to a settlement out of the 500*l.*, as it never was her money, and was only a debt due to the husband from the father. (h)

But though in cases where a husband sues for a personal demand of his wife, or seeks to raise a sum of money in her right, the Court will not, unless the wife consents, permit the money to be paid over to the husband without imposing terms upon him; yet where the suit relates to the wife's real estate, the

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(c) Sawer v. Shute, 1 Aust. 63.
(d) Ball v. Coutts, 1 V. & B. 300.
(e) Jewson v. Moulson, 2 Atk. 419.
(f) Tothill, 114.
(g) Jewson v. Moulson, *ubi supra*; Milner v. Colmer, 2 P. Wms. 641; Adams v. Pierce, 3 P. Wms. 11; Brown v. Elton, 2 P. Wms. 202; Harrison v. Buckle, 1 Strs. 239; Winch v. Page, Bunb. 86; Middlecome v. Marlow, 2 Atk. 520.
(h) Brett v. Forcer, 3 Atk. 403.

Court will not oblige the husband to make a settlement out of it. Thus where a husband and wife filed a bill for the execution of the trusts of a will, by which the testator devised certain fee-farm rents to be conveyed to his daughters, of whom the female plaintiff was one, on their attaining twenty-one or marriage, the Court decreed the execution of the trusts according to the will, and would not impose any terms upon the husband. (*i*)

It is also to be remarked, that although the Court will in general oblige the husband to make a settlement upon his wife and children of any personal property which he may be entitled to in right of his wife, for the recovery of which it is necessary to resort to a Court of Equity, yet where there is no suit pending, the husband is authorized to lay hold of his wife's property wherever he can find it. (*k*) Thus there is no doubt that previously to bill, a trustee who is in possession of the wife's property, real or personal, may pay the rents of the real estate to the husband, or may hand over to him the personal estate, (*l*) [*130] *and the Court will not, upon bill filed, recall it. (*m*) Where, however, a bill has already been filed, a trustee cannot exercise his discretion upon this point, as the bill makes the Court the trustee, and takes away from the actual trustee his right of dealing with the property, without its sanction. This doctrine was laid down by Lord Alvanley in *Macauley* v. *Philips*, (*n*) and has since been recognized with approbation by Lord Eldon, in *Murray* v. *Elibank*. (*o*) But, though a trustee cannot, after a suit, pay over the rents and profits or the interest of the wife's property to the husband without the direction of the Court, yet the Court will not in general deprive the husband of the benefit of them during his life, (*p*) but will permit him, in consideration of his maintaining her, to enjoy them without requiring her consent or making any provision for her out of it. (*q*) This right will not, it seems, be forfeited by his declining to make a settlement upon her; and accordingly, in *Sleech* v. *Thorington*, (*r*) the Master of the Rolls said, that the Court did not think itself empowered to take away from the husband his wife's fortune so long as he was willing to live with and maintain her; and that where a husband would not go in before the Master, even in that case the Court would not proceed so far as to take away the produce from him and prevent his receiving the interest; but that it constantly, where the husband maintained his wife, accompanied the direction for a suspension with an order for payment of the interest to the husband. If, however, the husband misconduct himself, as in the instance of receiving a considerable part of his wife's portion so as to leave but a small part remaining, and then refusing to make an adequate settlement upon her, in such case, as Lord Hardwicke said, in *Bond* v. *Simmons*, (*s*) the Court will not merely stop the payment of the residue of her portion to her husband, but will prevent him from receiving the interest of that residue, in order that it may accumulate for the wife's benefit.

[*131] *In that case the Court had referred it to the Master to receive proposals from the husband for a settlement, and the Master had certified that no proposal had been made, in consequence of which the dividends of the wife's portion were suffered to remain in the hands of the Accountant General until the death of the husband; and upon a dispute arising whether these dividends belonged to the wife or to the representatives of the husband, Lord Hardwicke held that they belonged to the wife by survivorship. (*t*)

(*i*) Lupton v. Tempest, 2 Vern. 626.
(*l*) Murray v. Lord Elibank, 10 Ves. 90.
(*n*) 4 Ves. 15.
(*p*) Bond v. Simmons, 3 Atk. 20.
(*r*) 2 Ves. 561.
(*t*) Bond v. Simmons, 3 Atk. 20.
(*k*) Jewson v. Moulson, 2 Atk. 419.
(*m*) Glaister v. Hewer, 8 Ves. 206.
(*o*) 10 Ves. 90.
(*q*) Allerton v. Knowel, cited 4 Ves. 799.
(*s*) 3 Atk. 20.

The principle upon which Courts of Equity give to the husband the interest of his wife's estate, being, as we have seen, to enable him to maintain her and the children of the marriage, it follows as one of the consequences of this principle, that if he desert his wife, or treat her with cruelty so as to oblige her to separate from him, the Court will allow her to receive the interest of her own fortune for her maintenance. (*u*)

Thus in *Watkyns* v. *Watkyns*, (*x*) were there was strong substantial evidence of the wife having been cruelly and barbarously used by her husband, who had quitted the kingdom after having possessed himself of the greatest part of her fortune, Lord Hardwicke, after directing it to be ascertained how much of her property remained in *specie*, ordered it to be placed out at interest, and such interest to be paid to the wife until her husband returned and maintained her as he ought to do; and so in *Wright* v. *Morley*, (*y*) where the husband went abroad and left his wife unprovided for, she being entitled to the interest of 4,000*l.* five per cents. for life, part of the dividends of which he had previously, with her concurrence, assigned to secure the payment of an annuity which he had granted for a valuable consideration, the Court ordered the remainder of the dividends to be paid to the wife for her separate use during the absence of her husband.

Upon the same principle, in *Oxenden* v. *Oxenden*, (*z*) where, [*132] by articles made previously to the marriage, the wife's property was agreed to be laid out in land, which was to be settled to the use of the husband for life, with remainder to the wife to increase her jointure, with remainder to the younger children; upon a bill being filed by the wife for the execution of the articles, and the husband's ill treatment of her having been duly proved, the Court ordered the money to be laid out, with her consent, in a purchase, and settled pursuant to the articles, but directed the interest, in the meantime, to be paid to her so long as she lived separate, although it was provided by the articles that till the purchase the interest should be paid to the husband.

It is to be observed, that in the above case the order was founded upon the circumstance of the trust not having been executed, and the consequent necessity the parties were under, of coming to the Court to have the execution of the articles decreed. Had the purchase been actually made and settled according to the articles, the Court could not have interferred to take away from the husband the legal right which he would thereby have acquired to the enjoyment of the property as tenant for life under a settlement.

The Court, however, will not permit the equity of the wife, to maintenance out of her own fortune, to be defeated by any trick or contrivance for that purpose on the part of her husband. If, therefore, as in *Colmer* v. *Colmer*, (*a*) he, with an intention to desert her (which he afterwards carries into effect,) make a fraudulent conveyance of his and her property upon trust to pay his own debts, the transaction will not prejudice her right to maintenance, but the Court will follow her property into the hands of the trustees, and order her an allowance suitable to her fortune and the circumstances of her husband, although it may be necessary, in order to effect that purpose, to resort to part of his own property so vested in trust.

In *Atherton* v. *Nowell*, (*b*) it appeared that the husband had induced his wife to marry him upon the *false* representation of his being a person of fortune,

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(*u*) Ibid; 2 Vern. 493; Prec. Ch. 239.

(*x*) 2 Atk. 96; to the same effect see Williams v. Callow, 2 Vern. 752; Sleech v. Thrington, 2 Ves. 562; Atherton v. Nowell, 1 Cox's Rep. 229.

(*y*) 11 Ves. 12, 23.

(*z*) 2 Vern. 493; Lord Rockingham v. Oxendon, Prec. Ch. 239, S. C.

(*a*) Mos. 113. (*b*) 1 Roper, H. & W. 284; 1 Cox, 229.

[*133] when, in fact, he was greatly indebted, and was shortly after the marriage *sent to prison, where she resided with him and endured some hardships, which were the consequences of her marriage; and it also appeared that the husband, after liberation from his first confinement, was again sent to prison for another debt, and remained there; that there was one child of the marriage living, to support whom and herself the wife was put to great difficulties; that her husband had refused to contribute to their support, requiring her to live with him in prison, or to be at his mercy for such occasional support as he might think proper to bestow; and that from his behaviour to her, as well as on account of her own health, she was *afraid* again to live with him in prison.—Under these special circumstances the Court ordered, upon cross petitions presented by the husband and wife (the former praying that the interest of the wife's fortune might be paid to him, and the latter for an allowance for maintenance,) that 50*l.* cash in the Bank might be paid to the wife for her separate use; and directed the Master to inquire into the circumstances and situation of the families of the husband and wife, with a view to the settlement of her fortune, &c.

It is to be observed that the Court will, as has been shown, not only appropriate the interest of a wife's equitable property for her support in cases where she had been deserted by her husband, or obliged to leave him in consequence of his improper conduct towards her; but it will, under similar circumstances, if a stranger has advanced to the wife money for her maintenance, order it to be repaid to him out of her estate. Thus, in *Guy* v. *Pearkes*, (*c*) where it appeared that the wife was unprovided for; that her husband, after having gone to sea and deserted her, had subsequently to his return neither cohabited with her, nor afforded her any support, but had since gone to the East Indies and had not been again heard of; and that it was unknown whether he were living or dead; and it also appeared that A. had made advances to her of 30*l.* a-year during the above period, which were her only support; upon application being made to the Court, that so much of the wife's stock standing in the Accountant General's name as would raise 210*l.* might be sold, and the pro-
[*134] ceeds paid to A. *in satisfaction of his debt; also that a further sum of 50*l.* might be paid to the wife, and that the dividends upon the remaining fund might in future be paid to her for her support, the application was granted, A. having made an affidavit that he was induced to make the advances upon the faith of being repaid them out of the above property. In pronouncing his judgment, Lord Eldon thus expressed himself: "I have a strong impression upon my mind that this has been done, and, independently of precedent, I think the Court may do it, as the husband deserting his wife leaves her credit for necessaries, and would be liable to an action; and although execution could not be had against the stock, the effect might be obtained circuitously, as he could not relieve himself except by giving his consent to the application of this fund."

If a husband be willing, and offer to maintain his wife, and she, without sufficient reason, refuse to reside with him, upon his application for the interest of her fortune, the Court will order payment of it to him, even though he decline to make a settlement upon her. Accordingly, in *Bullock* v. *Menzies*, (*d*) where A. the wife of B. being entitled for life to the interest of a considerable sum of money, obtained an order for payment of a yearly sum out of such interest for her maintenance, on the ground that her husband, who was an officer, was abroad with his regiment: the husband afterwards returned to England, and petitioned that the allowance should be paid to him and her jointly, stating that,

(*c*) 18 Ves. 196. (*d*) 4 Ves. 798.

although he was willing to receive his wife she refused to live with him; upon which, though the petition was resisted by the wife, the order obtained by her was discharged. Upon the husband afterwards going abroad, the wife presented another petition for payment of the same allowance, which was dismissed, because the husband was desirous to support her and himself with the fund, and was only prevented from so doing by her refusal to live with him. In the above case, it is to be remarked, that no misconduct whatever was imputed to the husband; he had not used his wife cruelly, nor deserted her, except so far as he was obliged to leave her for the sake of serving his country. He had a right, therefore, to the society of his wife upon his [*135] *return to England, as also to all those benefits which the law gives to a husband in the property of his wife. The wife, consequently had no reasonable ground for refusing to cohabit with her husband; and failed in making out a case for the interference of a Court of Equity with the legal rights of her husband.

As to the effect of the wife's misconduct upon her equity for a maintenance, it is a trite observation, that persons appealing to a court of justice ought to enter it with clean hands; *i. e.* they must be persons worthy and proper to receive the redress which they seek; hence it follows, that if the wife has been guilty of gross misconduct, a Court of Equity will not consider her to be a person entitled to its protection. If, therefore, she has committed adultery, or has eloped from her husband without a sufficient reason, and these facts are properly put in issue and proved, the Court will remain passive, and not interfere at her suit to allow her a maintenance out of her equitable property. (*e*)

Another consequence of the principle upon which the Court gives the interest of the wife's equitable property to the husband, namely, to assist him in her maintenance, is, that if the husband is deprived either by his own act or by that of the law, of the means of contributing to her support, the Court will take care that a suitable maintenance is given to the wife out of the proceeds and profits of her own property; therefore, "if the husband becomes bankrupt, or takes the benefit of an Insolvent Debtor's Act, this Court will fasten the obligation of maintaining the wife out of her property upon the general assignee; for when the title of such assignee vests, the incapacity of the husband to maintain his wife has already raised this equity for her." (*f*) It is to be observed, however, that the right of the wife to such maintenance will attach only from the time of the bankruptcy; and so likewise where a wife is entitled to an annuity to her separate use, and permits it to be paid to her husband, who becomes bankrupt, she will have no claim for the arrears accrued previous to the bankruptcy. (*g*)

The rule that a wife is entitled to maintenance out of her own property, as against the assignees of her husband, does *not necessarily apply [*136] to a particular assignee for a valuable consideration, who purchases the life-interest of a wife during the time the husband is maintaining her, and before circumstances have raised any present equity in the property for the wife. (*i*)

Thus, in *Elliott* v. *Cordell*, above referred to, where the dividends of 9,000*l.* three per cents. were given to a married woman during her life, with a bequest over of the capital after her decease, and the husband and wife joined in a conveyance of their life-interest to a purchaser, after which the husband became bankrupt, upon a bill filed by the wife against the purchaser, insisting on a

(*e*) 1 Roper, H. & W. 283.
(*f*) Elliott v. Cordell, 5 Mad. 156.
(*g*) Carter v. Anderson, 3 Sim. 370.
(*i*) Carter v. Anderson, 3 Sim. 370.

provision, it was held by Sir J. Leach, V. C., that though the Court could, had there been no previous assignment, have compelled a provision for the wife as against the assignees under the bankruptcy, yet the purchaser was not obliged to make such a provision, on the ground that when his title vested, the husband was maintaining his wife, and no circumstance had raised any present equity for her. The principle here laid down has since been followed and acted upon by Lord Brougham, in *Stanton* v. *Hall*. (*k*)

It is to be observed, that in the preceding case of *Elliott* v. *Cordell*, as well as in that of *Stanton* v. *Hall*, there had been no failure on the part of the husband to maintain his wife prior to the assignment. Where there has been a previous failure, by the bankruptcy of the husband, and the wife's life-interest is subsequently conveyed by the general assignees to a particular assignee, such particular assignee must take it, subject to the same equity in the wife as that to which it was liable in the hands of the general assignees.

It is also to be observed, that in the above cases the subject matter was a mere life-interest. Where, however, a capital sum is at stake, a different rule prevails; in such cases, the equity of the wife to a settlement out of her own fortune, is not defeated by the assignment of the husband, unless the property be such as is assignable at law, in which case it is conceived that persons claiming the wife's property, will be entitled to hold it exempt from any [*137] right in the wife to a settlement, there being *no equity to entitle the Court to interfere upon the ground of favour due to the wife from any person claiming by legal title from the husband. (*l*) But if the husband or his assignee have no title at law to recover the wife's property, as where it is an equitable interest, in such cases, as he is obliged to apply to a Court of Equity for the recovery of it, the Court will impose the same conditions upon the assignee as it would have required from the husband. Upon this principle it is held, in the case of the assignees of a bankrupt husband, or of general assignees for the benefit of creditors, that the assignees cannot be in a better situation than the bankrupt himself, (*m*) and that they must make a provision for the wife out of such part of her property as cannot become at unless by suit in equity. (*n*)

The question whether in the case of a particular assignee claiming by purchase from the husband for a valuable consideration, the Court would or would not impose upon him the condition of making a settlement, has been long disputed; the result, however, seems to be, that such an assignee is bound to make a provision out of the fund for the wife and her children, but that, subject to such provision, he will be entitled to the equitable property discharged from the wife's title by survivorship. This point as to a settlement, appears to have been decided by Lord Northington, in the case of the *Earl of Salisbury* v. *Newton*, (*o*) in the year 1759. There the wife being entitled to 2,000*l.* as a portion under her father's marriage settlement, or to a legacy of 6,000*l.* under his will in lieu of it, her husband, who was indebted by bond to the Earl, assigned to a trustee for the Earl, all that he was entitled to in right of his wife, for payment of the bond-debt, and died, having made no provision for his wife and children. The bill was filed by the Earl against her trustee, for an assignment, and Lord Northington gave the usual directions as to the [*138] assignee making a settlement *upon the wife and her children, observing that the assignee could not be in a better situation than the husband under whom he claimed, and who must have made the settlement

(*k*) 2 Russ. & M. 175.
(*l*) Oswell v. Probert, 2 Ves. J. 682.
(*m*) Gayer v. Wilkinson, 1 Bro. C. C. 50, n.; Pryor v. Hill, 4 Bro. C. C. 139.
(*n*) Burdon v. Dean, 2 Ves. J. 607; Oswell v. Probert, 2 Ves. J. 682.
(*o*) 1 Eden's Rep. 370.

if the application had been made by him instead of the assignee. Notwithstanding this decision, the question was considered unsettled in *Worrall* v. *Marlar*, and *Bushman* v. *Pell*, in the year 1784, (*q*) when Lord Thurlow inclined to the opinion that the wife's equity would not prevail against the assignee of the husband for a valuable consideration; but that opinion, besides being opposed by the above decision of Lord Northington, is at variance with another by the same judge in the year 1765. In that case, (*r*) the husband and his wife assigned her interest in a legacy, to secure to A. 300*l.*, which A. became liable to pay, in consequence of his being surety for the husband in a bond for that sum; upon the bill of A., against the husband and wife, and the assignees, under a commission of bankruptcy which had issued against the husband, for payment of his debt out of the wife's share in her legacy, it was so decreed, subject to the settlement of a part upon the wife and children. In addition to these early decisions, and in opposition to the doubts of Lord Thurlow, there are the opinions of other great judges in favour of the wife's equity, which are founded upon the principle before laid down. In *Jewson* v. *Moulson*, (*s*) Lord Hardwicke refused to order payment to the husband's assignees for valuable consideration, of personal estate to which the wife was entitled under her father's will, and recommended them to agree to a settlement of part of the money upon the wife and her children, (which was assented to, and done accordingly,) his Lordship observing "that he laid great weight upon the assignment comprehending the whole of the wife's portion; and that if he allowed that practice to prevail, it would trip up all the care and caution of the Court; for a husband, then, would have nothing to do but to take up money of a third person, and although neither he nor the lender knew exactly at the time what the fortune was, yet he might assign it over, *and so defeat [*139] the care of the Court entirely." In *Like* v. *Beresford*, (*t*) *Pryor* v. *Hill*, (*u*) and *Macauly* v. *Philips*, (*x*) the Court gave opinions agreeably to those of Lords Hardwicke and Northington. In the last of those cases, Lord Alvanley expressed a very decided opinion upon this subject to the following effect: "Many cases upon this point have been before me, which have put me under the necessity of considering the rights of the wife; and I am clearly of opinion, the doubt respecting the assignment of the husband for a valuable consideration of the wife's equitable interest, was not well founded, with the single exception of a trust of a term of years of land, upon which, perhaps, there may be some doubt, but subject to that, I am clearly of opinion an assignment for a valuable consideration will not bar the equity of the wife; and it would be strange if it did, since, in the Courts of Law, with regard to an action brought against executors by the husband for a legacy due to his wife, it is determined that an action does not lie, and the reason given is, that it would totally defeat the wife's equity. It would be whimsical, then, that the assignment by the husband for valuable consideration, should put the assignee in equity in a better situation than the husband himself is at law. The guard of this Court upon the wife's interest would be very singular, if the husband, not being entitled at law, might assign it for a valuable consideration to another person, who would be entitled in equity. I am clearly of opinion that it was only a doubt, and it never was decided that the husband could, by such assignment, or any other means, deprive her of her equity." In *Franco* v. *Franco*, (*y*) his Honor adhered to his opinion, and appears to have been prepared to decide

(*q*) See note to 1 P. Will. 459.
(*r*) Wenman v. Mason, in a note; 1 P. Will. 549, Ed. 5.
(*s*) 2 Atk. 417.
(*t*) 3 Ves. 511.
(*u*) 4 Brown, C. C. 139.
(*x*) 4 Ves. 19.
(*y*) 4 Ves. 530.

according to it, if the cause in its then stage would have permitted; and in *Johnson* v. *Johnson*, (z) Sir William Grant, M. R., said, that although it had been decided that an assignment, for a valuable consideration by the husband of [*140] his wife's property, was sufficient to bar the right of the wife *surviving, it did not take away her equity. Her right not to have it parted with without a settlement being made, still remained clear and untouched.

It is to be observed, that the Court has never required the husband, or the persons claiming under him, to settle the whole of the wife's *choses in action* upon her and children, but a reasonable proportion of them only. This point was maturely considered by Sir T. Plumer, V. C., in the case of *Beresford* v. *Hobson*, (a) where, after a revision of all the authorities, his Honor came to the above conclusion. In that case, upon a reference to the Master to receive proposals, for a settlement upon the wife of a bankrupt, he reported that he had allowed the whole of the fund, which was a legacy, to be settled upon her, because she had been deserted by her husband, and left by him without the means of support. Upon exceptions to the report, Sir Thomas Plumer allowed them, and directed the Master to review his decision, observing that, "the question is not whether the assignees of a bankrupt are subject to this equity, but to what *extent* it is to be carried as against them. I have looked into all the authorities; in no case has the whole of the property been settled on the wife and children. In *Sleech* v. *Thorington*, (b) the husband was gone abroad, leaving his wife unprovided for, and yet all the Court appeared disposed to do, in conformity with a case there mentioned by the Master of the Rolls, was to direct the payment of the interest of the money to her till he returned and maintained her. In *Bond* v. *Simmons*, (c) the wife having brought the husband a considerable portion, of which no settlement was made, and he afterwards filing a bill for a legacy left to her, the Court decreed a settlement should be made, but he obstinately refusing to make a settlement, and dying, it was held she was entitled to the principal and dividends. In *Pryor* v. *Hill*, (d) creditors under a general assignment to them by the husband for payment of their debts, were held entitled to the life-interest of the wife, on making a provision *for her. In *Burdon* v. *Dean*, (e) the assignees filed a bill [*141] in respect of property belonging to the bankrupt in right of his wife, and the wife claimed a further provision, she having been provided for before by settlement. The Master of the Rolls said, 'it is impossible to give her the whole, for that would be to admit that a married woman is entitled to the whole of her separate property to her separate use.' He directed a reference to the Master for a proposal. In *Oswell* v. *Probert*, (f) where assignees claimed the estate of the wife in right of her husband, proposals for a settlement were in like manner directed. In *Warrall* v. *Marlar*, (g) the fund on a claim by assignees was equally divided between the assignees and the wife and children of the bankrupt. In *Brown* v. *Clarke*, (h) half the property was given to the wife. In *Freeman* v. *Parsley*, (i) and *Lumb* v. *Milnes*, (k) the assignees of a bankrupt, claiming property of the wife in his right, were directed to make a provision for the wife. In *Like* v. *Beresford*, (l) where a ward of

(z) 1 Jac. & W. 472.
(a) 1 Mad. 363.
(b) 2 Ves. 560.
(c) 3 Atk. 20; and see Mitford v. Mitford, 9 Ves. 87; Wright v. Morley, 11 Ves. 17.
(d) 4 Bro. C. C. 139.
(e) 2 Ves. jun. 607.
(f) 2 Ves. jun. 680.
(g) 1 P. Wms. 459, in note by Mr. Cox; S. C. 1 Cox, 158.
(h) 3 Ves. 166.
(i) 3 Ves. 421.
(k) 5 Ves. 517.
(l) 3 Ves. 506.

the Court had been run away with, the Court would not give the husband any part of the wife's fortune. It has a discretion in such cases whether it will give the whole or a part to the wife. In *Goose* v. *Davis*, in 1794, not reported, but mentioned in the sixth edition of Mr. Cooke's Bankrupt Law, (*m*) the Lord Chancellor referred the report back to the Master, to be attended by the assignees; the Master having by his report approved a settlement of the whole fund. In *Jacobs et Ux.* v. *Amyatt and others*, before the Master of the Rolls, 14th of November, 1792, and 17th of May, 1793, property was left to the wife of the bankrupt for life, and claimed by the assignees of her husband, the plaintiff, who was a bankrupt; and the master of the Rolls directed a reference to the Master. to receive proposals from Jacobs, the bankrupt, for a settlement on his wife, the bankrupt proposed that the whole should be settled on his wife, and that proposal was approved *of by the Master, no exceptions were taken, and therefore the Court was not called upon to give its opinion upon the report. There seems to have been a want of form in directing the husband to lay proposals before the Master because he of course would propose that the whole should be given to his wife rather than any part to his assignees, the assignees must have consented to this arrangement. In *Carr* v. *Taylor*, the assignees of the husband claimed property in right of the wife, who had a settlement on her marriage; and on the usual reference, a proposal was made to the assignees that half should be settled on the wife and children, and the other half go to the assignees; and that proposal was approved of by the Master. In *Wright* v. *Morley*, (*p*) Sir J. Leach says, 'When the husband becomes a bankrupt, and consequently incapable of maintaining his wife, it is not held that she is entitled to the whole of the dividends of her fortune, or of any life-interest that she may have, any more than she is entitled to the whole of her fortune consisting of a capital sum;' and further observes, 'If, then, in this case, instead of a particular assignee for a valuable consideration, I had before me merely the general assignees under a commission of bankruptcy, the wife could not, as against them, set up a claim for the whole of the dividends, I should think they dealt fairly and even favourably towards her, if out of 200*l.*, the produce of this fund, they allowed her to retain 160*l.*' This is a strong authority to show that even where the husband has left his wife and gone abroad, she is not entitled to the whole property. In no case has the Court given the whole to the wife. The question in most of the cases has been, how much the wife shall have; and in determining that the Court has exercised a discretion, and has not tied itself down to any precise rule, but has never given the whole."

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It is to be observed, that under the Marriage Act, 4 Geo. 4, c. 76, s. 23, in the case of a marriage solemnized between parties under age, by false oath or fraud, the guilty party is to forfeit all property accruing from the marriage, but *such property may, by order of the Court, made upon information filed by the Attorney General, be secured for the benefit of the innocent party, or the issue of the marriage, as the Court shall think fit, so as to prevent the offending party from deriving any interest in any estate, or pecuniary benefit from the marriage; under this Act it has been held that the Court has no discretion to mitigate the penalty, but in the case of the property being that of the wife, is bound to settle and secure all such property, past, present and future, for the benefit of herself or the issue of the marriage. (*q*)

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It appears formerly to have been considered, that if the husband has made a settlement upon his wife upon their marriage, the wife will be debarred of her

(*m*) Edit. by Gregg, p. 287. (*p*) 11 Ves. p. 20, 21.
(*q*) Attorney General v. Mullay, 4 Russ. 329.

right to a further provision out of any property which may subsequently accrue to her; (r) but it seems now to be settled that the Court, according to the power which it uses, and the care which it always takes of the interest of *femes covert*, will, where there is a slender provision only made for the wife by settlement before marriage, on an accession of fortune, if it be considerable (not a trifle only) oblige the husband to make a further provision for her. (s) In such cases, however, much must depend upon the terms of the settlement; for if it appears, either by express words or by fair inference, that it was the intention of the parties that the husband should be the purchaser of the future as well as the present property of the wife, the Court will not require the husband to make an additional settlement. In such cases, however, the settlement for this purpose must either express it to be in consideration of the wife's fortune, or the contents of it altogether must import that, and plainly import it, as much as if it were expressed. (t)

The right of a wife to a settlement, does not attach upon property in which she has a life-interest only; such property belongs to the husband, *jure mariti*, subject to the obligation before noticed as being imposed upon him by the law, [*144] of *maintaining her. (x) If the husband fail in that obligation either by the desertion of his wife, or by his inability to assist in her support, in consequence of bankruptcy or insolvency, the Court, as in the case of the interest arising from her capital, fastens the obligation upon the property itself, and will give her a provision out of it, in the one case against the husband, and in the other against his assignees; but it has been held, that where a wife has an ample separate provision, secured to her by settlement or from other sources, the principle which declares her to be entitled to a provision out of her life-estate, against her husband's general assignees, or against his incumbrancers upon her estate, will not apply. (y) It has been held also not to apply in the case of a particular assignee of the wife's life-estate who purchased it, when the husband was maintaining the wife, and before any circumstances had raised a present equity in the property for the wife. (z)

The wife's equity for a settlement is not for her benefit only, but for that of herself and children; (a) and though, as has been before stated, she may upon her examination waive it, she cannot take it for herself, and give it up for them. The only instance in which a different course was ever adopted, appears to have been in the case of *Johnson* v. *Johnson*; (b) in that case a fund in Court belonging to the wife having been assigned by the husband, an order was made, (the wife being examined and consenting,) that part should be transferred to the assignee, and that the other part should be paid to the separate use of the wife, with liberty for the persons entitled to apply on her death. Upon an application made by the assignee after the death of the wife, who had survived the husband, Sir Thomas Plumer, M. R., refused to make the order, saying, that [*145] it was quite an unusual thing to make, in this manner, a partial settlement *upon the wife alone, directing the interest to be paid to her for life, it being quite clear that the children must be included. His Honor, however, was of opinion, that as the order had been made above 34 years ago,

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(r) Lancy v. Duchess of Athol, 2 Atk. 448.

(s) March v. Head, 3 Atk. 720; Tomkyns v. Ladbroke, 2 Ves. 591, 595; Stackpole v. Beaumont, 3 Ves. 98; Lady Elibank v. Montolieu, 5 Ves. 737.

(t) *Per* Lord Eldon, in Druce v. Denison, 6 Ves. 395.

(x) Burdon v. Dean, 2 Ves. J. 608; Oswell v. Probert, 2 Ves. J. 680; Brown v. Clark, 3 Ves. 166; Freeman v. Parsley, ib. 421; Lumb v. Milnes, 5 Ves. 517; Elliott v. Cordell, 5 Mad. 155; Aguilar v. Aguilar, 5 Mad. 414; Pryor v. Hill, 4 Bro. C. C. 139.

(y) Ibid. (z) Elliott v. Cordell, *ubi supra*.

(a) Murray v. Lord Elibank, 10 Ves. 84; Lloyd v. Williams, 1 Mad. 450.

(b) 1 Jac. & W. 472–5.

he could not alter it, and directed the payment of the money to the second husband of the wife, (the wife consenting) on the ground that the wife was entitled by survivorship.

But though the equity which compels the husband to make a settlement out of the wife's personal estate is the right of the children as well as of the wife, yet it does not survive to the children after her death; (c) but in such case the whole fund will go to the husband by survivorship. It has been thought that Sir Thomas Sewell, in the case of *Cockel* v. *Phipps*, (d) acted in direct contradiction to Lord Northington's decision upon this point in *Scriven* v. *Tapley*. It appears, however, from the very elaborate judgment of Sir Thomas Plumer, V. C. in *Lloyd* v. *Williams*, (e) that the case has been erroneously reported, and that it does not bear upon the question.

In *Murray* v. *Lord Elibank*, (f) and particularly in the above-cited case of *Lloyd* v. *Williams*, all the previous cases and the reasoning upon the subject have been collected and commented upon, and it appears from them to have been the opinion both of Lord Eldon and of Sir T. Plumer, that the children have no equity after the death of the mother, unless there has been a contract or a decree for a settlement in her life-time. (g) If, however, there has been an order or decree referring it to the Master to approve a proper settlement to be made upon a married woman and her children out of the property of the woman, and she die before the Master has made his report, the children will have a right to a settlement, under the order, out of their mother's property; (h) and it seems that the children are clearly entitled to assert this right by supplemental bill. (i)

*From the opinions expressed in the above-mentioned cases of *Murray* v. *Lord Elibank*, and *Lloyd* v. *Williams*, it seems that [*146] Lord Eldon and Sir Thomas Plumer considered that the equity of the wife to a settlement in favour of herself and children, did not attach till after a decree or order referring it to the Master to approve of a settlement. In *Steinmetz* v. *Halthin*, (k) however, Sir J. Leach, V. C. appears to have come to a different conclusion, and to have considered that the right of the wife to a settlement, does not depend upon the decree or order for referring it to the Master to approve a settlement, but attaches upon the property immediately upon the filing of the bill, which gives the Court jurisdiction as to that property, whether the bill be filed by the wife or by others; and that when once the equity of the wife has attached upon the property, it continues for the benefit of the children, notwithstanding the death of the wife before the settlement is executed. In that case the bill was instituted by the executors of the will, under which the wife became entitled to the property, praying the direction of the Court concerning it, and the wife had died before answer, and the Court held her children entitled to the money, on the ground that the right had attached upon the filing of the bill, and the wife had done no act to waive it.

But whether the equity of the wife to a settlement, for the benefit of herself and children, attaches upon the property so early as the period of filing the bill, or not, it is clear that the wife may at any time before the execution of a settlement, even after the Master has actually approved of one under a decree, appear in Court and waive her right, so as altogether to defeat her children. (l)

(c) Scriven v. Tapley, 2 Ed. 337; Amb. 509, S. C.
(d) 1 Dick. 391.
(e) 1 Mad. 450.
(f) 10 Ves. 84.
(g) 1 Mad. 467.
(h) Murray v. Lord Elibank, 10 Ves. 84.
(i) Ibid. 84; 13 Ves. 1; S. C. 14 Ves. 496, S. C.
(k) 1 Glynn & J. 64.
(l) Rowe v. Jackson, 2 Dick. 604; Murray v. Lord Elibank, 10 Ves. 84; Martin v. Mitchell, cited 10 Ves. 89; Steinmetz v. Halthin, 1 Glynn & J. 64.

With respect to the question of whether it is competent to the wife, by consent in Court, to waive her right to a settlement for herself and her issue, after a contract entered into on the part of the husband to make one, it is to be observed that in *Ex parte Gardiner*, (*m*) Lord Hardwicke held [*147] that she *might waive it as far as her own interest was concerned, but not for her children. In that case a reference had been made to the Master to approve a proper settlement, in consequence of which, proposals had been given in and signed both by husband and wife, by which he was to settle an estate in Jamaica in strict settlement. Before the matter was ultimately concluded, the husband and wife went to Jamaica, where they staid six years, and upon their return, there being no children, they preferred a petition to have the money paid out of Court to the husband, the wife consenting; but Lord Hardwicke refused the application, being of opinion that the proposal was binding, and that if the husband had died abroad, and had left children, such children would have been entitled, under those articles, to have had it carried into execution.

The same rule was subsequently acted upon by Sir. J. Leach, V. C., in *Fenner* v. *Taylor*, (*n*) and though that decision was afterwards reversed by Lord Brougham, yet, as that reversal was upon the ground that, what the Vice Chancellor had treated as a binding agreement, had on a former occasion been considered by Sir William Grant as merely voluntary and such as a Court of Equity would not carry into effect, the principle upon which the case was originally determined, must be considered as undisturbed by the reversal of the Vice Chancellor's decision.

It seems that if, after a reference to approve of a settlement, one of the parties die before the settlement be approved of by the Court, and there are no children of the marriage, the right of survivorship as between the husband and the wife is not affected. Thus in *Macaulay* v. *Philips*, (*o*) Lord Alvanley laid it down, that if the wife had died even after a proposal had been made by the husband under such an order, the husband would have been entitled. His Lordship, however, said, that he did not mean to determine what the case would have been if the proposal had been approved of by the Court, and a settlement ordered to be made (as perhaps then the Court would have considered it as actually made,) and *that he was far from determining [*148] that in such a case the settlement would be entirely at an end; on the contrary, he thought it would be binding, and that the accident would make no difference.

It may be observed here, that if the wife be an adulteress, living apart from her husband, a Court of Equity will not interfere upon her application for a settlement out of her own *choses in action*, neither will it order them to be paid to her husband; not to the former, because she is unworthy of the Court's notice or interference; nor to the latter, because he does not maintain her, in respect of which duty only the law gives to him her fortune. Accordingly, in *Carr* v. *Eastabrooke*, (*q*) cross petitions were presented by the husband and wife, the one praying that 350*l.* belonging to her, might be settled to her separate use, the other that the money might be paid to the husband without his making any provision for her. The wife had eloped and had lived in adultery, and her husband had obtained a divorce *à mensâ et thoro*, but at the time of the application the adulterer was dead, and the wife was supported by his mother;

(*m*) Anon. 2 Ves. 671.
(*n*) 1 Sim. 169; 2 Russ. & M. 190, S. C.
(*o*) 4 Ves. 19.
(*q*) 4 Ves. 146. See also Ball v. Montgomery, 2 Ves. jun. 191; and Watkyns v. Watkyns, 2 Atk. 97.

the Lord Chancellor said he could make no order upon either petition, that he could not settle the sum to the wife's separate use, and that he must leave it as it was. But the rule is different in instances of female wards of the Court who are married without its consent; for although they afterwards live in adultery, the Court will enforce a settlement; (r) because the marriage being a contempt, the Court thereby obtained jurisdiction to commit the husband, in consequence of his misconduct, until he should make a proper settlement, and will not part with that power until that act be done, whatever may be the irregularity of the wife's conduct, which may be attributed in some degree to her husband's conduct in procuring such a clandestine marriage.

With respect to the order, which is usually made upon an application for the property of the wife, in case the wife does not consent, the terms of it are, that it be referred to the Master to inquire, and state to the Court whether any settlement *has been made; and in case the Master shall find that none has been made, or if any has been executed, if he does not [*149] approve of the same, then the husband is to be at liberty to lay proposals before the Master, and the Master is to state the same, with his opinion, to the Court. (s) Where a reference is made to the Master to approve of a proper settlement upon the wife out of a particular property, it is always usual to direct the Master to have regard to any settlement which the husband may have made upon the wife *aliunde*. And as the extent of the provision out of the particular property in question may be affected by any prior settlement made by the husband, so also in making such provision, regard ought to be had to any other property which may have been possessed by the husband in right of his wife; for the adequacy of the prior settlement to the equity of the wife, must depend upon the amount of the other property possessed in her right. (t) The usual order in such cases therefore, is, to refer it to the Master to approve of a proper settlement upon the wife and children, "regard being had to the extent of the wife's fortune, and to any settlement which may already have been made upon her."

Where the property of a married woman is a subject of equitable cognizance, it is not material whether the aid of the Court is sought by the wife, or by the husband or his representatives or assignees; and it is now certain that a *feme covert* may herself file a bill for the purpose of having that to which she is entitled secured to her and her family. (u) In *Lady Elibank* v. *Montolieu*, (x) where a bill was filed by a married woman against her husband, Lord Thurlow said that the only difficulty he had was, upon the form of the suit, whether a married woman, by her next friend, could be a plaintiff in this Court; but that with respect to that difficulty, if upon the point of law, she was entitled, and there was no way of asserting her right against her husband but by bill, that objection he thought did not weigh much, and his Lordship ultimately made the decree.

*No doubt, therefore, can be now entertained, that a wife may, under such circumstances, be the plaintiff in a suit against her hus- [*150]

(r) Ball v. Coutts, 1 Ves. & Bea. 302–304.

(s) Seton on Dec. 259; Hand's Prac. 217.

(t) Green v. Otte, 1 S. & S. 254; Bond v. Simmons, 3 Atk. 20; Elibank v. Montolieu, 5 Ves. 744.

(u) Worrall v. Marlar, cited in Mr. Cox's note to Bosvil v. Brandon, 1 P. Wms. 459, where the cases on this subject are collected.

(x) 5 Ves. 743.

band; and indeed it seems necessary that in all those cases in which her interests are in opposition to the rights claimed by her husband, she should be entitled to sue as a plaintiff without her husband joining; (y) for the husband being the person, or one of the persons complained of, the complaint cannot be made by him. In such cases, however, it is necessary that the husband should be a substantive party to the suit, the mere naming him as the next friend of the wife will not be sufficient, and upon this ground, in *Smyth* v. *Myers*, (z) the Court granted a motion made on the part of the plaintiff, who had a separate estate, for liberty to strike out the name of the husband as next friend, and to make him a co-plaintiff.

It is to be observed here, that where the suit is for a *chose in action* of the wife, the wife's right to a settlement will not be prejudiced by her husband being joined with her, because all suits and defences, in this Court, by husband and wife jointly, where there is no appearance for the wife by guardian, are considered as suits and defences of the husband, and the Court therefore will not suffer the money to be paid to the husband on the prayer of his counsel, because it knows that the instructions to counsel come from the husband, who has the power of the suit and defence. In such cases, therefore, the Court expects that the wife should attend in Court, or before commissioners, and give her consent, before it will make an order for payment to the husband. (a) And upon this principle, where a married woman having a separate interest, joins as a co-plaintiff or co-defendant with the husband, instead of suing by her next friend, or answering separately, the suit or defence, will not prejudice a future claim by the wife in respect of her separate interest; (b) and it has been decided, [*151] that a suit by a husband and wife against the *trustees of the wife's separate property, cannot be pleaded in bar to a subsequent suit by her and her next friend, against the trustees and her husband, although the relief prayed in both suits is the same. (c)

In general, however, where the suit relates to anything for the separate use of the wife, the bill ought to be filed in her name by her *prochein amy*, otherwise it is her husband's bill. The Court however will, under those circumstances, take care of the wife, and order payment to some person for her. (d)

The effect of joining the husband as co-plaintiff in a bill by a wife, respecting her separate estate, is an admission by him that it is the separate property of the wife, in as full a manner as he could make such an admission if he were a defendant. (e)

As a wife may sue her husband in respect of her separate property, so may a husband in a similar case sue his wife. (f) Such suit, however, can only be in respect of his wife's separate estate; for a husband cannot have a discovery of his own estate against his wife. (g)

Where it is necessary that a suit respecting the property of a married woman should be instituted against her husband, or that the husband should be one of the defendants, as the wife being under the disability of coverture cannot sue alone, and she cannot sue under the protection of her husband, she must seek other protection, and the bill must be exhibited in her name by her next friend; (h)

(y) Regnes v. Lewes, 1 Ch. Ca. 35; S. C. Nels. 88; and Kirk v. Clark, Prec. Ch. 275; Oxenden v. Oxenden, 2 Vern. 493; Lawley v. Halpen, Bunb. 310; Lady Elibank v. Montolieu, *ubi supra*.

(z) 3 Mad. 474.

(a) Pawlet v. Delaval, 2 Ves. 663–669; *vide etiam* Mole v. Smith, 1 J. & W. 665.

(b) Hughes v. Evans, 1 S. & S. 185. (c) Reeve v. Dalby, 2 S. & S. 464.

(d) Griffith v. Hood, 2 Ves. 452.

(e) Smyth v. Myers, 3 Mad. 474; *vide* Ryan v. Anderson, ib. 174.

(f) Warner v. Warner, 1 Dick. 90; Ainslie v. Medlicott, 13 Ves. 266.

(g) Brooks v. Brooks, Prec. Ch. 24. (h) Griffith v. Hood, 2 Ves. 452.

who is also named as such in the bill, as in the case of an infant. (*i*) A bill, however, cannot, as in the case of an infant, be instituted by a next friend on behalf of a married woman, without her consent, and if a suit should be so instituted, upon her affidavit of the matter it will be dismissed. (*k*)

*The *prochein amy* of a married woman need not be a relation, but he must be a person of substance, because he is liable to costs;(*l*) [*152] and in this respect there is a material difference between the *prochein amy* of a *feme covert* and of an infant, for any person may file a bill in the name of an infant, but the suit of a *feme covert* is substantially her own suit, and her next friend is selected by her. In the former case, therefore, as we have seen, (*m*) the Court does not require that the next friend should be a person of substance, because if the friends of an infant are poor, the infant might, by such a rule, be deprived of the opportunity of asserting his right, but in the case of a *feme covert*, as the object for which a *prochein amy* is required is that he may be answerable for the costs, the Court expects that the person she chooses to fill that office should be one who can pay the costs if it should turn out that the proceeding is ill-founded; and it has even gone the length of saying, that where the next friend of a married woman takes the benefit of an Insolvent Act, it will not suffer the cause to proceed till the next friend is changed, or security is given for the costs. (*n*) It seems, however, that in the latter case the proper motion to be made is, "that all proceedings in the suit may be stayed until security be given for the costs," and that an application to remove the next friend and appoint another in his stead would be improper. (*o*)

In the case of *Lawley* v. *Halpen*, (*p*) a *feme covert* plaintiff was permitted to change her next friend after considerable progress had been made in the cause, but the order was only made upon condition that the new next friend should enter into a recognizance to answer all the costs, as well those which had accrued before, as those which would accrue after, his appointment.

In *Barlee* v. *Barlee*, (*q*) where the next friend of a married woman died pending the suit, the Court ordered, upon the application of the defendant, that the bill should be dismissed unless a new next friend be named within two months.

In that case it is also to be observed, that the Court made it *part of the order, that in case the bill should be dismissed, the costs of [*153] the defendant should be paid out of the fund in Court, which fund had arisen from the rents of the wife's separate estate, which was the subject of litigation; from which it appears that the property of a married woman in the hands of the Court will be considered liable to the costs of a suit instituted by her touching that property.

If a bill has been filed by a *feme sole*, and she intermarry pending the suit, the proceedings are thereby abated, and cannot properly be continued without a bill of revivor. If, however, a female plaintiff marries, and afterwards proceeds in the suit as a *feme sole*, the mere want of a bill of revivor is not an error for which a decree can be reversed upon a bill of review brought by a defend-

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(*i*) Lord Red. 22. Where the husband is under any of the disabilities enumerated in the commencement of this chapter, in such case the wife is considered as a *feme sole*, and may sue without the intervention of a next friend.

(*k*) Andrews v. Cradock, Prec. Ch. 376; Gilbert Rep. 36, S. C.

(*l*) Anon. 1 Atk. 570.

(*m*) *Ante*, p. 103, 104.

(*n*) Pennington v. Alvin, 1 S. & S. 264.

(*o*) Ibid.

(*p*) Bunb. 310.

(*q*) 1 S. & S. 100.

ant, because, after a decree made in point of right, a matter which may be pleaded in abatement, is not an error upon which to ground a bill of review. (*s*)

It has been determined, that if a female plaintiff marries pending a suit, and afterwards before revivor her husband dies, a bill of revivor becomes unnecessary. her incapacity to prosecute the suit being removed; the subsequent proceedings ought, however, to be in the name and with the description which she has acquired by the marriage. (*t*)

Where a bill has been filed by a man and his wife touching the personal property of the wife, and the husband dies pending the suit, no abatement of the suit takes place, but the wife, unless any act has been done which may have the effect of depriving her of her right by survivorship, may continue the suit without filing a bill of revivor. If, however, she does not think proper to proceed with the cause, she will not be liable to the costs already incurred, because a woman cannot be made responsible for any act done by her husband during the coverture; but if she take any step in the cause subsequent to her [*154] *husband's death, she will make herself liable to the costs from the beginning. (*u*)

A different rule with respect to the right to continue a suit instituted by a husband and wife, prevails when the wife dies in the life-time of her husband, from that which is acted upon when the husband dies in the life-time of his wife, for in that case, although the husband upon the death of his wife becomes entitled to all her *choses in action*, he does not acquire such title by survivorship, but in a new character, and an absolute abatement of suit takes place, so that to entitle himself to continue it, the husband must first clothe himself with the character of her personal representative by taking out administration to her effects, and then proceed to file a bill of revivor. And here it is to be observed, that if after the death of the wife the husband were to die before the termination of the suit, the party to continue the suit would not be the personal representative of the husband, although such personal representative would be the party entitled to the money; and it is remarkable that in such a case, the Ecclesiastical Court considers itself bound to grant administration to the next of kin of the wife, and not the personal representative of the husband, (*x*) although such administrator will be considered in equity as a trustee for the representative of the husband. The same rule is observed by the Ecclesiastical Courts where the husband, having taken out administration to his wife, dies before he has administered all her property; in such case also the Ecclesiastical Courts consider themselves bound to commit the administration *de bonis non* to the next of kin of the wife, and not to the representatives of the husband, although they are the parties entitled to the property. (*y*)

But although it is in general necessary that a husband, after the death of his wife, pending a suit instituted by them for the recovery of her personal property, should, in order to entitle him to proceed with the cause, take out administration to his wife, and then file a bill of revivor; yet if any act has been done, the effect of which would have been to deprive the wife, in case she had

(*s*) Viscountess Cranborne v. Dalmahoy, Nels. R. 85; S. C. 1 Ch. R. 231. So at law, if a woman sues or is sued as *sole*, and judgment is against her as such, though she was *covert*, she shall be estopped, and the sheriff shall take advantage of the estoppel; 1 Salk. 310; 1 Roll. Abr. 869, pl. 50.

(*t*) Godbin v. Earl Ferrars, Lord Red. 47, n.

(*u*) Lord Red. 47; *vide etiam*, 3 Atk. 726, & Bond v. Simmons, ib. 21.

(*x*) Williams on Executors, 244, 910. (*y*) Ibid.

outlived her husband, of her right by survivorship, *and to vest the property in the husband absolutely, the husband may, it is apprehended, continue the suit in his individual character without taking out administration to his wife. [*155]

In such case, however, it will be necessary, if such act has taken place subsequently to the institution of the suit, to bring the fact before the Court by means of a supplemental bill, unless it appears upon the proceedings which have already taken place in the cause.

This distinction renders it important to consider what the circumstances are which will have the effect of so altering the property as to vest the right to the wife's personal property absolutely in the husband, and entitle him to proceed in a suit without assuming the character of her personal representative.

Upon this subject it is to be observed, that a mere intention to alter the property will not have the effect of giving the husband the absolute right in it, and that therefore the mere bringing an action at law, or filing a bill in equity, will not alter the property, unless there be a judgment or decree for payment to the husband alone.

And so it has been decided, that an appropriation by an executrix of so much of the assets of her testator as was necessary to discharge a legacy bequeathed to a married woman, was not such a change of the property as would vest it in the husband; but it seems, that if a person indebted to a married woman or holding money belonging to her, pay such money into Court in a cause to which the husband and wife are parties, such payment will be considered as an alteration of the property; for as properly it could only have been paid during coverture to the husband, the circumstance of its having been made into Court will not alter the rights of the parties, and it will be considered as a payment made to him. (z) For the same reason, where the jewels of the wife had been deposited in Court by the husband under an order, they were considered as belonging to the husband's executors, and not to the representative of the wife who had survived, because, having been in the possession of the husband, even a *tortious* act could not divest that property and turn it into a *chose in action*, (a) much less could a payment into Court *under an order. And so where a married woman, who was the committee of the estate and person of her lunatic husband, was entitled to stock which was standing in the name of a trustee for her, and this stock was by an order made in the lunacy transferred into the name of the Accountant General in the matter of the lunacy, and part of it was afterwards sold out and applied in payment of costs in the lunacy, Lord Lyndhurst held, that the mode in which the stock had been dealt with amounted to a reduction into possession by the husband; because as payment by the trustee to the lunatic or to the committee, would have been a reduction into possession; so payment into Court to the credit of the lunacy, was equally a reduction into possession for the lunatic; and upon this ground his Lordship refused to grant a petition, presented by the wife after the death of the lunatic, praying that the stock might be transferred to her, as belonging to her by survivorship. (b) If, however, money paid into Court be carried by order to the joint names of the husband and wife, the case will be different, and the wife will not be deprived of her right of survivorship, in the case of the husband dying before he has procured an order for the payment of it out of Court: (c) and it seems that a mere payment or transfer of money or stock to trustees for the benefit of the wife, will not give the husband the absolute right to the money to the exclusion of the wife. [*156]

(z) Packer v. Wyndham, Prec. Ch. 412. (a) Ibid.
(b) *In re* Jenkins, 5 Russ. 183. (c) Ibid.

It appears formerly to have been held that a promissory note given to a wife during coverture, became the property of the husband absolutely, as the wife could not acquire property during coverture, and upon this principle, Lord Hardwicke, in *Lightbourne* v. *Holyday*, (*d*) held, that upon the death of the husband in a suit respecting a note of this description, the suit abated, and in *Hodges* v. *Beverley*, (*e*) it was determined that a note given to a *feme covert*, was, upon her husband's death, to be considered as his assets. But in *Nash* v. *Nash*, (*f*) Sir Thomas Plumer, V. C. held, that a note given to a wife was a *chose in action* of the wife, and survived to her on the death [*157] of her husband, and that the circumstance of the *husband having received the interest and part of the capital in his lifetime, for which he gave a receipt, did not alter the nature of the property, but that the remainder of the money still remained a *chose in action*.

In the last case a receipt of part of the money by the husband was not, as we have seen, held sufficient to altar the nature of the property in the remainder so as to deprive the wife of her right to it by survivorship. In general, however, if the husband, either alone or jointly with his wife, authorize another person to receive the property of the wife, whether it be money, legacy or other thing, and such person actually obtain it, such receipt will change the wife's interest in the property, and be a reduction into possession by the husband. Thus, in *Doswell* v. *Earle*, (*h*) where an executor, with the wife's consent, had paid a legacy, to which the wife was entitled upon the death of her mother, to the husband, upon his undertaking to pay the interest to the mother during her life, and the wife having survived her and her husband filed a bill claiming the money against her husband's executors, the bill was dismissed.

The mere proof of a debt due to the wife by the husband under a fiat or commission of bankrupt against the debtor, will not alter the property of the debt, and it still remains a *chose in action*. (*i*) It seems, however, that an award by an arbitrator giving money to the husband, to which he was entitled in right of his wife, will have the effect of altering the property and giving it to the husband absolutely. (*k*)

With respect to the effect of a judgment at law in altering the property of a wife's *chose in action*, much depends, as we have seen, upon whether the wife is or is not named in the proceeding. If the wife be not a party, (which she need not be at law, if the right accrued to the wife during coverture,) a judgment in an action commenced by the husband will vest the property in the husband, so that in the event of the death of the husband before execution, the wife would be deprived of her right by survivorship; (*l*) this, however, will not be the case if the wife be a party, in which case, if the husband die [*158] *after judgment and before execution sued out, the judgment will survive to her. (*m*)

Decrees in equity, as we have seen, so far resemble judgments at law in this respect, that until the money be ordered to be paid, or declared to belong to the one or the other, the rights of the parties will remain undisturbed; but an order for payment of a sum of money to the husband in right of his wife, changes the property and vests it in the husband. (*n*)

Where, however, a decree or order has been made by the Court for the payment of a sum of money to the husband and wife, and either party dies before

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(*d*) 2 Eq. Ca. Ab. 1; 2 Mad. 135, n.
(*e*) Bunb. 188.
(*f*) 2 Mad. 133.
(*h*) 12 Ves. 473.
(*i*) Anon. 2 Vern. 707.
(*k*) Oglander v. Batson, 1 Vern. 396.
(*l*) Oglander v. Batson, 1 Vern. 396; Garforth v. Bradley, 2 Ves. 677.
(*m*) Garforth v. Bradley, 2 Ves. 677.
(*n*) Heygate v. Annesley, 3 Bro. C. C. 362.

payment, the money will belong to the survivor. Thus, where a plaintiff and his wife brought their bill against an executor for a legacy bequeathed to the wife before marriage, and a decree was made that the money should be paid to the plaintiffs; upon a question whether the money should go to the wife or to the administratrix of the husband, the Court referred it to one of the Judges to certify, who gave it as his opinion, that a decree in Chancery for money or any other personal thing, being a judgment in equity, was of the like nature with, and ought to be governed by the same rules as a judgment for a debt or damages at common law, and consequently that the interest or benefit of the decree, and the money due thereby, ought to go and be to such of the parties as should have the right thereto in case it were a judgment for debt or damages at common law, according to which, if a judgment be had by husband and wife in an action brought by them for a debt due to the wife before marriage, and the husband dies after the judgment and before execution sued, the debt due on the judgment belongs to the wife, and she may sue execution upon the judgment, and not the executor or administrator of the husband. (*o*) This opinion was acted upon by the Court in another case, where a man and his wife brought their bill to redeem a mortgage of the wife's estate, and the defendants put in a plea to the bill, which was overruled, for which 5*l.* costs were given to the plaintiffs; upon the death of the husband a question arose as to who was *entitled to the costs, and the Lord Chancellor (King) for some time doubted, [*159] and asked the Registrar, but afterwards, taking it to be as a joint judgment for a sum certain, determined that it did survive to the wife. (*p*) Upon the same principle, in *Forbes* v. *Phipps*, (*q*) where a decree was made that one-sixth of the residue to which the wife was entitled, should be paid to her and her husband, and the wife died before the money was received, it was determined by Lord Northington, that the husband was entitled to the money, not as administrator to the wife, but as survivor under the decree.

With respect to the effect of an assignment by the husband of his wife's *chose in action* upon her right of survivorship, it is to be observed, that where the *chose in action* is capable of immediate reduction into possession, the wife will, by such an assignment, be deprived of her right, but that where it is not capable of immediate reduction into possession, as where it is in reversion or expectancy, an assignment of it will not bar the right which the wife would otherwise have had to possess it in the event of her surviving her husband, unless it is actually reduced into possession before his death.

It appears formerly to have been considered that in this respect there existed a difference been *legal* and *equitable choses in action*, or, to speak more correctly, between *choses in action* and equitable interests in the nature of *choses in action*, with respect to which latter it appears to have been thought that an assignment of them by the husband would, in certain cases, without any reduction into possession before his death, have the effect of defeating the wife's right to them by survivorship; and attempts have been made to establish distinctions in this respect between assignments for valuable consideration and assignments without consideration or by operation of law, the former having been considered as barring the right of the surviving wife, and the latter as not having that effect. The decisions, however, of Sir Thomas Plumer in *Hornsby* v. *Lee*, (*r*) and *Purdew* v. *Jackson*, (*s*) have removed all doubts *upon this subject, and have shown that no such distinction as that [*160] supposed between legal and equitable *choses in action*, or between assignments of the latter for valuable consideration, and voluntary or general assignments,

(*o*) Nanney v. Martin, 1 Cha. Rep. 239.
(*p*) Cappin v. ——, 2 P. Wms. 496.
(*q*) 1 Eden. 502.
(*r*) 2 Mad. 21.
(*s*) 1 Russ. 1.

exists. The case of *Hornsby* v. *Lee* arose upon an assignment by the husband and wife of the wife's reversionary interest in certain stock. After the assignment the husband took advantage of an Insolvent Debtor's Act, and a general assignment was made of his property. The person on whose death the wife was to become entitled to the stock, died in the lifetime of the husband and wife, and the husband died, before his wife, without having done any other act to reduce the stock into possession, whereupon the wife filed a bill, praying to have the stock transferred to her, and the Vice Chancellor, Sir Thomas Plumer, made a decree in her favour.

In *Purdew* v. *Jackson*, the question again came before the same Judge, who after long argument, and a diligent and careful investigation of all the cases which had occurred upon the point, expressed his opinion to remain unchanged; viz: "that all assignments made by the husband of the wife's outstanding personal chattel, which *is not* or *cannot* be reduced into possession, whether the assignment be in bankruptcy or under the Insolvent Act, or to trustees for the payment of debts, or to a purchaser for a valuable consideration, pass only the interest which the husband has subject to the wife's right by survivorship." (*t*)

The decision of Sir Thomas Plumer in the above cases, has since received the sanction of Lord Lyndhurst in *Honner* v. *Morton*, (*u*) and of Sir John Leach in *Watson* v. *Dennis*. (*x*) In *Stamper* v. *Barker*, (*y*) Sir John Leach had previously determined that an assignment by the husband and wife, in a deed of separation, of a contingent reversionary interest of the wife in a sum of stock, and of a vested reversionary interest belonging to the wife of another sum of stock, upon trust as to one moiety of each fund to the husband absolutely, and as to the other to the separate use of the wife *absolutely, did not deprive the wife of her title by survivorship to the whole of each fund. [*161]

The rule, however, laid down by Sir Thomas Plumer, that all assignments made by the husband of the wife's outstanding personal chattel, which is not or cannot be then reduced into possession, pass only the interest which the husband has, subject to the wife's legal right of survivorship, must be considered as applying only to assignments of those chattels which are not capable of being immediately reduced into possession, and not to assignments for valuable consideration of *choses in action* belonging to the wife which at the time of the assignment are capable of reduction into possession. An assignment of a *chose in action* of the latter description has, it seems, the effect of barring the wife of her right of survivorship even though no actual reduction into possession takes place before the death of the husband. This appears to have been the principle upon which the Court acted in *Bates* v. *Dandy*, (*z*) and in the *Earl of Salisbury* v. *Newton*; (*a*) and in *Johnson* v. *Johnson*, (*b*) which was the case of an assignment by the husband for a valuable consideration of a fund in Court belonging to the wife, Sir Thomas Plumer himself said, "If it were now a new point, it would be difficult to understand how the assignee could be in a better situation than the husband himself, for the assignment does not reduce it into possession: it still remains a *chose in action*, and its being a *chose in action* gives the wife a right by survivorship. But it is too late to consider this, for it is decided that an assignment for valuable consideration

(*t*) 1 Russ. 70.
(*u*) 3 Russ. 65.
(*x*) 3 Russ. 90.
(*y*) 5 Mad. 157.
(*z*) 2 Atk. 207; *sed vide* 3 Russ. 20, 33, *notis*.
(*a*) 1 Eden. 370; cited 4 Ves. 529, S. C.; 3 Russ. 20, n.
(*b*) 1 Jac. & W. 472–476.

being a disposition of the property, is sufficient to bar the right of the wife surviving."

This distinction between the effect of an assignment upon the wife's right of survivorship, where the *chose in action* is capable of immediate reduction into possession, and where it is not, is very clearly expressed by Lord Lyndhurst in *Honnor* v. *Morton*, (c) which has been before referred to. His Lordship is there reported to have said, that "at law the *choses in *action* of the wife belong to the husband if he reduces them into possession; [*162] if he does not reduce them into possession, and dies before his wife, they survive to her. When the husband assigns the *chose in action* of the wife, one would suppose, on the first impression, that the assignee would not be in a better situation than the assignor, and that he too must take some steps towards reducing the subject into possession, in order to make his title good against the surviving wife. But equity considers the assignment by the husband as amounting to an agreement that he will reduce the property into possession; it likewise considers what a party agrees to do as actually done; and therefore, where the husband has the power of reducing the property into possession, his assignment of the *chose in action* of the wife will be regarded as a reduction of it into possession."

The distinction which has been thus pointed out between the effect of an assignment by the husband upon a *chose in action* which is capable of immediate reduction into possession, and one which is not, applies only where the assignment is for a valuable consideration, and not to assignments by act of law; thus in *Pierce* v. *Thorneley*, (d) where a married woman had a vested interest in possession in a legacy, and her husband became bankrupt and died, it was decided that the widow, and not the assignee, was entitled to the money, because the assignment in bankruptcy could not pass to the assignee a larger right or better title than the husband himself had, which was a right to reduce the legacy into possession, which was not done in his lifetime; and in *Gayner* v. *Wilkinson*, (e) which was the case of a reversionary interest in stock belonging to the wife of a bankrupt, which became absolute in the lifetime of the husband, who nevertheless died in the lifetime of the wife before it was reduced into possession, the Court dismissed a bill filed by the husband's assignees for the purpose of recovering the stock. It is, however, to be observed, that an assignment under a bankruptcy will pass the whole of whatever interest the husband has in the wife's *chose in action* at the time of bankruptcy; and therefore in the case of **Ripley* v. *Woods*, (f) where [*163] a man whose wife was entitled to personalty, subject to a life interest in her mother, became a bankrupt and obtained his certificate, and afterwards the tenant for life died, and then the wife, to whom the husband took out administration, the Vice Chancellor, Sir A. Hart, decided that the assignees of the husband were the persons entitled to the fund in dispute, because the husband, by the marriage, had an incipient right to the *chose in action* which would become vested in his wife if she survived her mother, and as that event had happened in the lifetime of the husband, it became vested in her, so that the husband could have reduced it into possession: the husband, therefore, had at his bankruptcy an incipient right, which was capable of being passed by the assignment; and as the events which happened would have given the husband the whole interest by survivorship in case he had not been a bankrupt, it was held that the whole right of the husband vested in the assignees by virtue of the assignment, which had given them the right in its incipient state.

(c) 3 Russ. 65.
(d) 2 Sim. 167.
(e) 2 Dick. 491; S. C. 1 Bro. C. C. 50, n.
(f) 2 Sim. 165.

It is to be observed here, that although an assignment by the husband of his wife's equitable *chose in action*, when such *chose in action* is capable of immediate reduction into possession, will have the effect of depriving the wife of her right to it in the event of her surviving her husband, such an assignment will not deprive the wife of her equitable right to a settlement out of it, where the property is the subject of litigation in a Court of Equity. The distinctions upon this subject have been already pointed out; (*g*) it will be sufficient, therefore, in this place, merely to draw the reader's attention to the fact, that generally in such a case the assignee of a wife's equitable *chose in action*, even where the assignment has been for a valuable consideration, will not, any more than the husband himself, be permitted to receive it out of Court unless the wife, upon being examined apart, consent to waive her right to a settlement out of it.

But even the wife's concurrence in an assignment by her husband during coverture, will not have the effect of depriving *her of her right by survivorship in cases where an assignment by her husband alone would not have that consequence. This was decided in the case of *Stamper* v. *Barker*, (*h*) before referred to; and it appears from the same case, that where a *feme covert* is an infant, the circumstance of her father being party to the deed will not alter the interest of the wife, for although it is true that the law of this court permits a father or guardian of a female infant to contract before marriage on her part with her intended husband as to her personal estate, because otherwise it would become his property, and as to her jointure, because her benefit and the convenience of families requires it, there is no principle or authority for stating that after marriage a parent or guardian can bind the interest of an infant *feme covert*. (*i*)

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The rule that the concurrence of the wife in an assignment of her reversionary *chose in action* will not deprive her of her right by survivorship, will not be affected by the circumstance of the wife's consent having been given in Court, upon examination apart from her husband. This point was discussed in *Woollands* v. *Crowcher*, (*k*) before Sir William Grant. In that case the wife was entitled under a will to a reversionary interest for life in certain stocks belonging to the testator, and she, together with her husband, contracted to sell her reversionary interest to the defendant, who objected to complete the purchase without the consent of the wife in Court; upon which the bill was filed for a specific performance. The Master of the Rolls expressed a doubt whether this was a proper case for taking the consent of the wife. "The ordinary occasion for that is where the husband applies to have paid to him money that belongs presently and immediately to his wife. Her equity is, not to prevent his receipt of it, (for it belongs to him) but to have a settlement, and the Court requires her consent to the payment to him without a settlement. But in this instance the object is not to bar her equity to have a settlement, but to bar her right to the survivorship, for upon his death it belongs to her entirely. She is giving up, not her equity only, but her entire right by survivorship. That is not the case in which the Court takes her consent. If the husband has a right to convey, let him exercise his right; but why this court should join and aid him for that purpose, I do not know." It is true that in the same case, Sir William Grant afterwards took the consent of the wife, but it was taken only *de bene esse*, so as not to prejudice the question in the event of her being the survivor. It should also be observed, that in two cases before Lord Alvanley, *Hewitt* v. *Crowcher*, and *Gregg* v. *Crowcher*,

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(*g*) *Ante*, p. 136.
(*h*) *Ubi supra*, *vide etiam* Duke of Chandos v. Talbot, 2 P. Wms. 602.
(*i*) 5 Mad. 157.
(*k*) 12 Ves. 175.

cited in *Woollands* v. *Crowcher*, (*l*) and in *Howard* v. *Damiani*, (*m*) before Sir William Grant, the consent of the wife seems to have been taken; but, as was observed by Lord Lyndhurst upon these cases, in his judgment in *Honner* v. *Morton*, (*n*) we know nothing of what was said before Lord Alvanley, so that no reliance can be placed on those cases. Neither can any reliance be placed on *Howard* v. *Damiani*, which was a mere order by consent. It may be observed in this place, that in *Richards* v. *Chambers*, (*o*) Sir William Grant determined that there was no Jurisdiction in a Court of Equity to direct, with the consent of a married woman taken upon examination, a transfer to her husband of personal property settled in trust for her absolutely in case she should survive him; and the same opinion appears to have been entertained by Sir John Leach, V. C., in *Pickard* v. *Roberts*. (*p*)

With respect to the effect of a release by the husband in depriving a wife of her right by survivorship to her *choses in action* not reduced into possession during the lifetime of the husband, it seems that a husband after marriage may release debts due to the wife before marriage, and also legacies absolutely given to her; (*q*) he may also release her interest under the statute of distribution, and the like; and these acts may be done by him although he and his wife be divorced *à mensa et thoro*, because the marriage still subsists. (*r*)

It has been argued, upon the authority of a *dictum* of Lord *Holt in *Gage* v. *Acton*, (*s*) "that where the wife has any right or duty which by possibility may happen to accrue during the marriage, the husband may release or discharge it," that the release by the husband of a reversionary interest of the wife would have the effect of barring her right by survivorship. This point has, however, been ably considered both by Sir Thomas Plumer, in *Purdew* v. *Jackson*, (*t*) and by Lord Lyndhurst, in *Honner* v. *Morton*; (*u*) and according to the opinion of the former, although all the authorities upon this subject are not perhaps easily reconcileable with each other, thus much seems to be clear, "that if the wife's *chose in action* is in contingency, depending on the event of survivorship, the husband may release his own right, but he cannot bar or release her's;" and in *Honner* v. *Morton*, Lord Lyndhurst observes, "Whether the *dictum* (of Lord Holt, in *Gage* v. *Acton*) be or be not accurately reported, I will not undertake to say, but in the judgment in which it occurs, Lord Holt differed from the rest of the Court, and the decision was contrary to his opinion. From the decision there was an appeal, which was afterwards abandoned. Lord Kenyon, when the case was cited before him, pronounced the opinion there delivered by Lord Holt, to be 'as repugnant to the rules of Law as of Equity.' (*x*) Lord Holt, according to the report in Raymond, cites *Lampet's* case, but *Lampet's* case does not support the position in the unqualified way in which he states it. Suppose the husband could release the wife's possibility at Law, I do not see how it follows that he can therefore assign it in equity. Admit the position that he can release it at law to be incontrovertible, he cannot make his own title perfect unless he reduces it into possession; why therefore should he be able to assign it in equity, and give another a title which he has not himself."

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It is to be observed, that the rules which have been above laid down, apply to those interests of the wife which are of a strictly personal nature: with respect to those interests which fall under the description of chattels real, dis-

(*l*) 12 Ves. 174.
(*m*) 2 Jac. & W. 458.
(*n*) *Ubi supra*.
(*o*) 10 Ves. 580.
(*p*) 3 Mad. 385.
(*q*) Gilb. Eq. R. 88; 2 Roll. Rep. 134.
(*r*) Stephens v. Totty, Noy. 45; Cro. Eliz. 908.
(*s*) 1 Salk. 327; 1 Lord Ray. 515.
(*t*) 1 Russ. 1.
(*u*) 3 Russ. 65.
(*x*) 4 T. R. 385.

[*167] tinctions exist *with respect to the effect of an assignment of a husband in barring his wife of her right in them by survivorship; which distinctions are important with reference to the question of abatement, and to other points incidental to suits in equity relating to property of that description.

The interest which the law gives to the husband in the chattels real which a wife has or may be possessed of during marriage, is a qualified title, being merely an interest in right of his wife, with a power of alienation during coverture; (y) so that if he do not dispose of his wife's terms for years or other real chattels in his lifetime, her right by survivorship will not be defeated; if, however, he do not alien them, and he survive his wife, the law gives them to him, not as representing the wife, but as a marital right. Thus if a *feme covert* has a term for years, and dies, the lease is the husband's, and he may maintain ejectment without taking out letters of administration; (z) and if a wife, tenant for a term of years of a copyhold, marries and dies before the term is expired, the husband shall continue without any new admission or fine. (a) These rules equally apply where the interest of the wife in the chattel is only equitable; thus where a term of years determinable upon lives was assigned to trustees in trust for a woman who married and died, upon a question whether this trust went to the husband, who survived, or to the wife's administrator, it was held clearly that the trust of a term, as well as the term itself, survived to the husband, and that he need not take out administration; (b) and so, as we have seen in the last case, (c) if a man assign over the *trust* of a term which he has in right of his wife, this shall prevail against the wife though she survives. This doctrine, as far as regards the trust of a term assigned to a trustee for a wife before marriage, appears to have been first laid down by the House of Lords on [*168] appeal in Sir *E. Turner's* case, (d) which, from the *report of the subsequent case of *Pett* v. *Hunt*, appears to have excited the surprise of the Lord Chancellor, (Lord Nottingham) who, however, after some hesitation, said he must be concluded by the Lords' judgment, and decreed accordingly. The ground of the decision in Sir *E. Turner's* case appears to have been this, that as the husband can at law dispose of a term for years, so he may dispose of the trust of a term in Equity, because the same rule of property must prevail in Equity as well as at Law, (e) and this has ever since been considered as the law of the Court. (f) Upon the same principle it has been held, that even where the term had been assigned to trustees for the separate use of the wife by her first husband, the second husband may sell or dispose of it, though he has made no provision for his wife. (g) In *Walter* v. *Saunders*, (h) a distinction was attempted to be drawn in argument between a term in trust to raise money for a woman, and a trust of the term itself for the woman, but the Master of the Rolls determined that no such distinction could be taken. (i) It has also been held, that if the wife has a judgment, and it is extended upon an *elegit*, the husband may assign it without consideration. So, if a judgment

(y) In a marginal abstract, 9 Mod. 104, it is said, that a wife being possessed of a term of years, and having married an alien, the marriage is not a gift in law of the term.

(z) Pale v. Michell, 2 Eq. Ca. Ab. p. 138; Pl. 4, n. (a).

(a) Earl of Bath v. Abney, 1 Dick. 260, arg.

(b) Pale v. Michell, 2 Eq. Ca. Ab. 138; pl. 4.

(c) Packer v. Wyndham, Sanders v. Page, 3 Ch. Rep. 223; Pitt v. Hunt, 1 Vern. 18; 2 Cha. Ca. 73.

(d) 1 Vern. 7, S. P.

(e) Per Lord Hardwicke, in Jewson v. Moulson, 2 Atk. 417, 421.

(f) Bates v. Dandy, 2 Atk. 207; Incledon v. Northcote, 3 Atk. 430.

(g) Tudor v. Samyne, 2 Vern. 270. (h) 1 Eq. Ca. Ab. 58, pl. 5.

(i) *Vide etiam* Packer v. Wyndham, *ubi supra*.

be given in trust for a *feme sole* who marries, and, by consent of her trustees, is in possession of the land extended, the husband may assign over the extended interest; and by the same reason, if a *feme* has a decree to hold and enjoy lands until a debt due to her is paid, and she is in possession of the land under this decree and marries, the husband may assign it without any consideration, for it is in the nature of an extent. (*k*) It seems also to be settled, that a husband may also assign his wife's mortgage in fee as well as her mortgage for a term, (*l*) though the contrary appears to have been considered as law in *Packer* v. *Wyndham*. (*m*)

It is to be observed, that although the husband is considered entitled to assign the trust of a term or other real chattel *created for the benefit of his wife, yet where a term or chattel real has been assigned in trust [*169] for a *feme* with the privity or consent of her husband, then without doubt he cannot dispose of it. (*n*) *A fortiori* he may not if he make a lease or term of years for the benefit of his wife. (*o*) And where a term was raised out of the wife's inheritance, and vested in trustees for purposes which were satisfied, and subject thereto for the benefit of the wife, her executors, administrators and assigns, it was held, that the particular purpose being served for which the term was raised, the trust did not go to the husband, who was the administrator of the wife, but followed the inheritance. (*p*) From this it may be inferred, that the assignment of the trust of such a term by the husband in the lifetime of the wife, would not affect the wife's interest in it by survivorship.

In an anonymous case which occurs in 9 Modern Reports, (*q*) it appears that a *feme covert*, but who had been divorced *à mensa et thoro*, and had alimony allowed to support her, applied to the Court to restrain her husband from proceeding to sell a term of years of which she was possessed before her marriage, and that the Court at first refused the injunction, because the separation *à mensa et thoro* did not destroy the marriage, and during the time the marriage continued, the husband had the same power to dispose of the term which he had in right of his wife, as he would have had if it had been in his own right; but afterwards, upon counsel still pressing for an injunction, in order that the merits of the cause might come before the Court, and insisting very much upon the hardship of the case, the Court granted it, on the ground that though the marriage continues notwithstanding the divorce, yet under such circumstances the husband does nothing in his capacity of husband, nor the wife in that of wife. It is to be remarked, however, that this was merely an interlocutory order to prevent the term being parted with *by the husband till the question should be properly discussed, and it does not appear that [*170] any further proceedings were ever had in the cause.

It seems that an abolute transfer or assignment by the husband of his wife's term of years or other chattel real is not requisite to deprive the wife of her survivorship, but that since an agreement to do an act is considered in Equity the same as if the act were done, so if the husband agree or covenant to dispose of his wife's term of years, such covenant will be enforced although he dies in her lifetime. (*r*)

(*k*) Lord Carteret v. Paschall, 3 P. Wms. 200.

(*l*) Bates v. Dandy, 2 Atk. 207; Bosvil v. Brander, 1 P. Wms. 459.

(*m*) *Ubi supra.*

(*n*) Sir E. Turner's case, 1 Vern. 7; *Vide etiam* Bosvil v. Brander, 1 P. Wms. 458; Pitt v. Hunt, 1 Vern. 18, where Lord Nottingham, however, said, that to prevent a husband, he must be a party to the assignment.

(*o*) Wicke's case, Scacc. Pasc. 8 Jack. cited 1 Vern. 7, Ed. Raithby, *notis.*

(*p*) Best v. Stampford. 2 Freem. 288; S. C. 2 Vern. 520; Prec. Ch. 252.

(*q*) 9 Mod. 43.

(*r*) Bates v. Dandy, *ubi supra; vide etiam* Head v. Cragh, 9 Mod. 13; Shannock v. Bradstreet, 1 Sch. & Lef. 52.

The power which the law gives the husband to alien the whole interest of his wife in her chattels real, necessarily authorizes him to dispose of it in part; if, therefore, the husband be possessed of a term of years in right of his wife or jointly with her, and demise it for a less term, reserving rent, and dies, such demise or under-lease will be good against her although she survive him, but the residue of the original term will belong to her as undisposed of by her husband. (s)

So also if the husband alien the whole of the term of which he is possessed in right of his wife, upon condition that the grantee pay a sum of money to his executors, and then dies, and the condition is broken, upon which his executors enter upon the lands, this disposition by the husband will be sufficient to bar the wife of her interest in the term, it having been wholly disposed of by him during his life, and vested in the grantee. (t)

It seems, however, that if the condition had been so framed that it might have been broken in the husband's lifetime, and he had entered for the breach, and had then died before his wife without making any disposition of the term, she would be entitled to it by survivorship, because the husband, by re-entry for a breach of the condition, was returned to the same right and interest in the term as he was possessed of at the time of the grant, viz: in right of his wife. (u)

[*171] *In cases of assignments by the husband of his wife's chattels real, the wife will be equally barred of her survivorship whether the assignment be for a valuable, or without any consideration; (x) but it is to be observed that there is a great distinction where the disposition is of the whole or part of the property, and where it is only a collateral grant of something out of it; for although if a husband pledge a term of years of his wife for a debt, and either assign or agree to assign all or part of such term to the creditor, the transaction will bind the wife; (y) yet if the transaction be collateral to, and do not change the property in the term, as in the grant of a rent out of it, then if the wife survive the husband, her right being paramount, and her interest in the chattel not having been displaced, she will be entitled to the term discharged from the rent. (z)

In regard to the right of the husband's executors or his surviving wife to rents reserved upon under-leases of her chattels real, and to the arrears of rents due at the husband's death, there is a difference of opinion in the books, which may probably be reconciled by attending to the manner in which the rents were reserved. Accordingly, if the husband alone grant an under-lease of his wife's term of years, reserving a rent, that would be a good demise, and bind the wife as long as the sub-demise continued; the husband's executors, therefore, would, as it is presumed, be entitled not only to the subsequent accruing rents, but to the arrears due at his death. (a) And it would seem that the principle of the last case would entitle the executors, to the exclusion of the surviving wife, to subsequent rents and all arrears at the husband's death, although the wife was a party to the under-lease, provided the rent were reserved to the husband only, because the effect of the sub-demise and reservation was an absolute disposition *pro tanto* of the wife's original term which she could not avoid, and the rent

[*172] was the sole and absolute property of the husband. *But if in the last case the rent had been reserved by the husband to himself and wife, then as their interests in the term granted and the rent reserved were joint

(s) Sym's Cases, Cro. Eliz. 33; Co. Lit. 46, b.
(t) Co. Lit. 46, b.
(u) *Vide* Watts v. Thomas, 2 P. Wms, 364–366.
(x) Lord Carteret v. Paschal, 3 P. Wms. 197.
(y) Bates v. Dandy, *ubi sup.* (z) Co. Lit. 184, b.
(a) 1 Roll. Abr. 344, 345; Co. Lit. 46, b.; 2 Lev. 100; 3 Keb. 309.

and entire, it is conceived that the wife, upon surviving her husband, would be entitled to the future rents, and that she would be equally entitled to the arrears of rent at her husband's death, because they remaining in action, and being due in respect of the joint interest of the husband and wife in the term, would, with their principal the term, survive to the wife. (*b*)

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*CHAPTER IV. [*173]

OF THE PERSONS AGAINST WHOM A SUIT MAY BE INSTITUTED.

SECTION I.

Who may be Defendants to a Suit.

Having pointed out the persons who are capable of instituting suits in equity, and considered the peculiarities of practice applicable to each description of parties complainant, we come now to the consideration of the persons against whom suits may be commenced and carried on, and the practice of the Court as applicable to them.

A bill in equity may be exhibited against all bodies politic and corporate, and all other persons whatsoever, who are in any way interested in the subject-matter in litigation, except only the King and Queen consort and the heir apparent, whose prerogatives prevent their being sued in their own names, though they may in certain cases, as we shall see presently, be sued by their respective Attorneys or Solicitors General.

But although all persons are subject to be sued in equity, there are some individuals whose rights and interests are so mixed up and blended with that of others, that a bill cannot be brought against them unless such other persons are joined with them as co-defendants; and there are other individuals who, although their interests are distinct and independent, so that they may be sued alone upon the record, are yet incapable, from the want of maturity or weakness of their intellectual faculties, of conducting their own defence, and must therefore apply for and obtain the assistance of others to do it on their behalf.

In the first class are included married women, whose husbands must be joined with them as co-defendants upon the record, and persons who have been found idiots or lunatic, whose committees must be made co-defendants with the persons whose property is entrusted to their care. (*a*)

*Under the second head are comprised infants, and all persons who although they have not been found idiots or lunatics by inquisition, are nevertheless of such weak intellects as to be incapable of conducting a defence by themselves, in both which cases the Court will appoint guardians for the purpose of conducting the defence on their behalf. [*174]

There is another class of persons, who although they are under no personal disability which prevents their being made amenable to the jurisdiction of the Courts, yet from the circumstance of their property being vested in others, either permanently or temporarily, are not only incapable of being made defend-

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(*b*) 4 Vin. Abr. (d. a.) 117. (*a*) Lord Red. 23.

ants alone, but, as long as the disability under which they labour continues, ought not to be parties to the record at all. In this class are included bankrupts, insolvent debtors, outlaws, and persons attainted or convicted of treason or felony.

In the present chapter the reader's attention will first be directed to the cases in which the Attorney or Solicitor General, either of the King or Queen consort, or of the Duke of Cornwall, can be made defendants to a suit, and then to the rules of practice affecting corporations either aggregate or sole, when made defendants on the record; in connexion with which will be noticed the practice applicable to particular corporate bodies, viz: the Bank of England, East India Company and South Sea Company, who from the peculiarity of their situation as trustees for the public of certain stocks or funds, the management of which has been committed to their care, have been the subject of certain rules and regulations which are not applicable to other corporations.

The reader's attention will then be called to the rules of practice applicable to the several classes of persons above pointed out, and then to the method of defending a suit *in formâ pauperis*. And lastly, will be pointed out the consequences arising from a person who is a necessary party to a suit, being out of the jurisdiction of the Court, and the various regulations from time to time adopted by the Court, or enacted by the Legislature, for the purpose of obviating the inconvenience arising from that circumstance to the other litigating parties.

[*175] *SECTION II.

The King's Attorney General.

ALTHOUGH the King's Attorney General, as representing the interest of the Crown, may, in certain cases, which will be presently pointed out, be made a defendant to a bill in equity, yet this is to be understood as only applicable to cases in which the interest of the Crown is not *immediately* concerned; for where the rights of the Crown are immediately in question, as in cases in which he is in actual possession of the property in dispute, or where any title is vested in the King which the suit seeks to divest, a bill will not in general lie, but the party claiming must apply for relief to the King himself by petition of right. (*a*)

A petition of right to the King is in the nature of an action against a subject in which the petitioner sets out his right to that which is demanded by him, and prays the King to do him right and justice, and upon a due and lawful trial of his right and title, to make him restitution. It is called a petition of right, because the King is bound of right to answer it, and to let the matter therein contained be determined in a legal way, in like manner as causes between subject and subject. This petition is to be determined in Chancery, and the method is this; (*c*) the petition is presented to the King who subscribes it with these words, "*soit droit fait al partie*," *i. e.* let right be done to the party; and thereupon it is delivered to the Chancellor, *in forma juris exequend: i. e.*

(*a*) Reeve v. Attorney General, cited 1 Ves. 445, 446. Legal Judic. in Chancery, stated 18.

(*c*) Coke's Entries, 419 a, 422 b; Legal Judic. in Chancery, stated 18.

to be executed according to law, and directions are given that the Attorney General should be made a party to the suit. (*d*)

But, although, in general, a bill cannot be filed against the Attorney General for the purpose of enforcing equitable rights against the direct interests of the Crown, yet in certain cases* bills will be entertained on the Equity side of the Court of Exchequer, as a Court of Revenue, against [*176] the Attorney General, as representing the King, for the purpose of establishing claims against the estates or revenues of the Crown, which in the Court of Chancery or other Courts, could not have been instituted without proceeding in the first instance by petition of right. Thus, in the case of *Lutwich* v. *The Attorney General*, mentioned by Lord Hardwicke in *Reeve* v. *The Attorney General*, (*e*) where Mr. Lutwich had a mortgage in fee on Sir William Perkin's estate, who was attainted, and brought his bill to foreclose, making the Attorney General a party, the Court of Exchequer, although they would not decree a foreclosure against the Crown, granted relief by directing that the mortgagee should hold and enjoy till the Crown thought proper to redeem the estate. So also in *Casberd* v. *The Attorney General*, (*f*) the Court relieved an equitable mortgagee of lands, which had been seized under an extent; and it is to be observed, that in the case of *Reeve* v. *Attorney General*, (*g*) Lord Hardwicke appeared to think, that although in the Court of Chancery he was obliged to dismiss the bill, yet that the Court of Exchequer might have granted the relief sought, namely, the performance of a trust against the Crown, where the trust estate had devolved upon the King, in consequence of the death of the surviving trustee without heirs. (*h*)

There is another class of suits which may be noticed here, against the Attorney General, which have been frequently instituted on the Equity side of the Court of Exchequer, as a Court of Revenue; viz: suits for the purpose of relieving accountants to the Crown against the decisions of the Commissioners for auditing the Public Accounts, under the 25 Geo. 3, c. 52.

It has now been fully decided, that when public accountants have reason to be dissatisfied with the determination of such Commissioners, either in disallowing their articles of discharge *or in imposing surcharges, they [*177] must proceed in the Equity side of the Exchequer, against the Attorney General, and not against the Commissioners; and that the proper mode of proceeding in such cases is by bill only, and not by motion or petition. (*i*) It has also been held, that the statutes providing for the relief of accountants to the Crown, are not confined to cases where the accountant has actually been sued or impleaded, but that he may proceed immediately, even during the passing of his accounts, by bill in equity, as it were *quia timet*. (*k*)

It is to be observed, that where an accountant to the Crown seeks relief in the Court of Exchequer by means of a bill against the Attorney General, the Attorney General cannot, if the accountant is entitled to relief, protect himself by demurrer from making the discovery sought by the bill, and that in a very recent case such a demurrer has been over-ruled. (*l*) In that case the Attorney General had filed an information in the Court of Exchequer, against an army agent, for an account of his dealings with the War-office, upon which the

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(*d*) Redesd. Tr. Ch. Pl. 30, 31.
(*e*) 2 Atk. 223.
(*f*) 6 Price, 411.
(*g*) *Ubi supra*.
(*h*) *Vide* Hix v. The Attorney General, Hardres, 176; *vide etiam*, Pawlett v. Attorney General, Hardres, 465.
(*i*) Colebrooke v. Attorney General, 7 Pri. 146; Crawford v. Attorney Gen. ibid. 1; *Ex parte* Colebrooke, 7 Pri. 87; *Ex parte* Durrand, 3 Anst. 743.
(*k*) Colebrooke v. Attorney General, *ubi supra*.
(*l*) Dean v. Attorney General, 1 Younge & Collyer, 267.

defendant filed a cross bill against the Attorney General and the Secretary at War, alleging that certain transactions had taken place between him and the War-office which amounted to a settlement of accounts, and praying a *quietus*, &c. To this bill the Attorney General and Secretary at War put in general demurrers, alleging as the cause of demurrer, "that it appeared by the bill that they were sued as officers of his Majesty's Government, acting for and on behalf of His Majesty, and concerning matters arising out of and within their duty and employment as such public officers, and not in any manner in their private character as individuals, &c." On the argument of the demurrer, it was alleged on the part of the Attorney General, that the plaintiff in the cross bill was not entitled to the relief he prayed, and it was strongly urged that not being entitled to the relief, he was not entitled to the discovery; but the Lord [*178] Chief Baron (Lord Abinger) held, that although the *plaintiff was not entitled to the specific relief prayed, yet that, inasmuch as taking the facts stated in the bill to be true, they amounted to a clear defence to the information exhibited against him by the Attorney General, he was entitled to this sort of relief, namely, to have the benefit of the discovery for the purpose of adducing those facts before the Court in a specific and distinct form, when both the causes should come on together. His lordship further said, he was not prepared to say that a bill of discovery ever had or ever could be filed against the Attorney General, for a discovery of facts that could be neither in his personal nor in his official knowledge, or that the Crown would be bound, through the medium of the Attorney General, to make that discovery; but at the same time it had been the practice, which he hoped never would be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a court of justice, where any real point that required judicial decision had occurred.

In cases in which the rights of the Crown are not immediately concerned, that is, where the Crown is not in possession, or a title vested in it is not sought to be impeached, but its rights are only incidentally involved in the suit, it has generally been considered that the King's Attorney General may be made a party in respect of those rights, whether the suit be in the Exchequer or in the Court of Chancery, or in any other Court of equity. (*m*) Thus, where in a litigation between the parties, a question may arise whether the King is not the party entitled instead of the individuals litigating, it is usual to make the Attorney General a party to the suit, and this whether any claim has been set up by the Crown or not. Indeed it seems that in all cases of such description, in which any right appears to be in the Crown, or the interests of the Crown may be in any way affected, the Court will refuse to proceed without the Attorney General, unless it is clear the result will be for the benefit of the Crown, (*n*) or at least that it will not be in disaffirmance or derogation of its interests (*o*) [*179] *Thus in *Birch* v. *Wastall*, (*p*) and in *Hayward* v. *Fry*, (*q*) where, in consequence of the outlawry of the defendants, it was held that all the defendants' interest was forfeited to the Crown, the Court directed the plaintiff to obtain a grant of it from the Exchequer, and to make the Attorney General a party to the suit. In *Burgess* v. *Wheate*, (*r*) Lord Hardwicke directed the case to stand over, in order that the Attorney General might be made a party; and in *Penn* v. *Lord Baltimore*, (*s*) which was a suit

(*m*) Lord Red. 24.
(*n*) Hovenden v. Lord Annesley, 2 Sch. & L. 618.
(*o*) Stafford v. Earl of Anglesey, Hardr. 181.
(*p*) 1 P. Wms. 445.
(*q*) Ibid. 446; and *vide* Rex v. Fowler, Bunb. 38.
(*r*) 1 Eden. 181. (*s*) 1 Ves. 444.

for the execution of articles relating to the boundaries of two provinces in America, held under letters patent from the King, the cause was ordered to stand over for the same purpose. In like manner in *Hovenden* v. *Lord Annesley*, (*t*) in which the parties claimed under two distinct grants from the Crown, each reserving a rent but of different amounts, it was held that inasmuch as the rights of the Crown were concerned, the Attorney General ought to be before the Court. (*u*) In *Barclay* v. *Russell*, (*x*) the Lord Chancellor (Lord Loughborough) dismissed the bill, because a title appeared upon the record for the Crown, although no claim had been made on its behalf. In that case the question arose as to the right to a sum of Bank stock which had been purchased by the government of the province of Maryland before the American war, and vested in the names of trustees for the discharge of certain bills, in respect of which no claim was ever made. After the peace by which the independence of the American colonies was acknowledged, a bill was filed by certain persons who claimed the stock under an assignment by the new government of the State of Maryland, in opposition to which, claims were set up by the surviving trustee, who, as there were no claims under the bills for the payment of which the trust had been created, insisted upon being beneficially entitled to the whole fund; a claim was also made by the proprietary under the old government, who insisted on a lien upon the stock, in consequence of the confiscation of their property, which took place *during the war by the authority of the then legislature of the province, in consequence of the trustees [*180] having refused to transfer the stock according to the provisions of an Act of that Legislature. The Court, however, upon the hearing, was of opinion that none of these parties had any claim upon the stock, and that it was a trust without any specific purpose to which it could be applied, the consequence of which was, that it was for the King to appoint for what purpose the stock should be applied. Upon the same principle, in *Dolder* v. *The Bank of England*, (*y*) Lord Eldon refused to order the dividends, which had been received before the filing of the bill, of stock purchased by the old government of Switzerland, to be paid into court by the trustees, on the application of the new government which had not been recognized by the government of this country, until the Attorney General was made a party to the suit. But although, in cases where a title in the Crown appears upon the record, the Court will not make a decree unless the Attorney General is a party to the suit, yet it seems that the circumstance of its appearing by the record that the plaintiff has been convicted of manslaughter, and that a commission of attainder has been issued, will not support a plea for not making the Attorney General a party, because an inquisition of attainder is only to inform, and does not entitle the Crown to any right. (*z*) It seems, however, that in this respect an inquisition of attainder differs from a commission to enquire whether a person under whom the plaintiff claims was an alien, the former being only for the sake of informing the Crown, but the latter to entitle. (*a*)

The necessity of making the Attorney General a party, is not confined to those cases in which the interests of the Crown in its own right are concerned, but it extends also to cases in which the King is considered as the protector of the rights of others. Thus, as we have seen before, the grantee of a *chose in action* from the Crown may either institute proceedings in the name of the Attorney General, or in his own name, making the Attorney General a defendant to the suit; and so in suits in which the Crown may be interested in its

(*t*) 2 Sch. & L. 610.
(*u*) Hovenden v. Lord Annesley, 2 Sch. & L. 617.
(*x*) 3 Ves. 436.
(*y*) 10 Ves. 352.
(*z*) Burk v. Brown, 2 Atk. 399.
(*a*) Ibid.

[*181] *character of protector of the rights of others, the Attorney General should be made a party. Thus, the Attorney General is a necessary party to all suits where the subject matter is either wholly or in part money appropriated for general charitable purposes, because the King as *parens patriæ* is supposed to superintend the administration of all charities, and acts in this behalf by his Attorney General. Where, however, a legacy is given to a charity already established, as where it is given to the trustees of a particular foundation, or to the treasurer or other officer of some charitable institution, to become a part of the general funds of such foundation or institution, the Attorney General need not be a party, because he can have no interference with the distribution of their general funds; (*b*) upon this ground where a legacy was given to a charity, and upon a bill filed against the executors for an account, an objection was taken because the Attorney General was not a party, the objection was over-ruled, and a decree made for an account, because upon such a decree the Master would report that there was such a legacy, and the parties might come in and claim before him. (*c*) And it seems that there is a distinction where trustees of the charity are appointed by the donor, and where no trustees are appointed but there is a devise immediately to charitable uses; in the latter case there can be no decree unless the Attorney General be made a party, but otherwise where trustees are appointed by the donor; (*d*) therefore, where a bill was filed to establish a will, and to perform several trusts, some of them relating to charities in which some of the trustees were plaintiffs, and other trustees and several of the *cestui que* trusts were defendants, an objection, because the Attorney General was not made a defendant, was over-ruled, it being considered that some of the trustees of the charity (*e*) being defendants, there might be a decree to compel the execution of the trusts relating to these charities. (*f*) In that case, it was said by the Lord Chancellor (Parker,) that [*182] if there should be any collusion *between the parties relating to the charity, the Attorney General might, notwithstanding a decree, bring an information to establish the charity and set aside the decree, and that he might do the same though he were made a defendant, in case of collusion between the parties; but it seems that the mere circumstance of the Attorney General not having been made a party to the proceeding, will not be a sufficient ground to sustain an information for the purpose of setting aside a decree made in a former suit, unless the decree is impeached upon other grounds. (*g*)

When it is said that in cases where a legacy is given to the trustees of a charity already in existence, for the general purposes of the charity, it will not be necessary in a suit concerning it, to make the Attorney General a defendant; the rule must be understood to apply only to those charities which are of a permanent nature, and whose objects are defined, for it has been determined, that where legacies are given to the officers of a charitable institution which is not of a permanent nature, or whose objects are not defined, it will be necessary to make the Attorney General a party to a suit relating to them. Thus, in the case of *Wellbeloved* v. *Jones*, (*h*) where a legacy was given to the officers, for the time being, of an academical institution, established at York for the education of dissenting ministers, which officers, with the addition of such other persons as they should choose, (in case they should think an additional number of

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(*b*) Wellbeloved v. Jones, 1 S. & S. 41. (*c*) Chitty v. Parker, 4 Bro. 38.
(*d*) 4 Vin. 500, Pl. 11, *notis*; 2 Eq. Ca. Ab. 267, Pl. 13, n.
(*e*) It appears from a subsequent part of the case that one of the trustees of the charity was abroad.
(*f*) Monil v. Lawson, 4 Vin. 500, Pl. 11; 2 Eq. Ca. Ab. 267.
(*g*) Attorney General v. Warren, 2 Swanst. 291.
(*h*) 1 S. & S. 43.

trustees necessary,) were to stand possessed of the money upon trust, to apply the interest and dividends for the augmentation of the salaries of dissenting ministers, a preference being given to those who should have been students in the York institution; and in case such institution should cease, then upon trust that the persons in whose names the fund should be invested, should transfer the same to the principal officers for the time being, of such other institution as should succeed the same, or be established upon similar principles; the Vice Chancellor, (Sir J. Leach,) upon a bill filed by the officers of the institution, praying to have the fund transferred *to them, to which the Attorney General was no party, ordered the case to stand over, with [*183] leave to amend by making the Attorney General a party; his Honor observing, that the Court would never permit the legacy to come into the hands of the plaintiffs, who happened to fill particular offices in the society, but would take care to secure the objects of the testator by the creation of a proper and permanent trust; and upon hearing the cause would send it to the Master for that purpose, and that it would be one of the duties of the Attorney General to attend the Master upon the subject.

It is to be observed also, that the Attorney General is a necessary party only where the charity is in the nature of a general charity, and that where it is merely a private charity, it will not be necessary to bring him before the Court; thus, where the suit related to a voluntary society, entered into for the purpose of providing a weekly payment to such of the members as should become necessitous, and their widows, Lord Hardwicke over-ruled the objection that the Attorney General was not a party, because it was in the nature only of a private charity. (*i*)

The Attorney General *quâ* such is always supposed to be in Court; (*k*) therefore if he is made a defendant as an officer of the Crown, the bill must pray, instead of the usual writ of *subpœna*, that he being attended with a copy, may appear and put in an answer. (*l*) If the Attorney General does not, upon being attended and served with a copy of the bill, appear, the Court will not make an order for him to appear, as no attachment can issue against him to enforce it. In such case, however, the plaintiff is entitled to justice, and the non-appearance of the Attorney General will be considered as a *nil dicit*. (*m*) If after appearance the Attorney General delays putting in his answer beyond a reasonable time, it is the ancient practice of the Court of Exchequer for the plaintiff to move the Court to appoint a day for the Attorney General to answer the bill, or in default that it should be taken *pro confesso*. (*n*) This practice *has been followed in a recent case; in which it was ordered, that unless the Attorney General put in his answer within a week, [*184] the bill should be set down to be taken *pro confesso*. (*o*) In that case it was alleged by the counsel who appeared on behalf of the Attorney General, that it was the intention of the Attorney General to file a cross information, and that the intricacy of the proceedings had been the only cause which had prevented its being sooner done, in consideration of which, and in order to give the Crown the benefit of the discovery to be sought by the cross information, it was made part of the order that the plaintiff should undertake not to pass publication until he should have put in a full answer to the cross information of the Attorney General, which was to be filed on or before a day named in the order.

When the Attorney General is made a defendant to a suit, it is entirely in

(*i*) Anon. 3 Atk. 277.
(*k*) Barclay v. Russell, 2 Dick. 729.
(*l*) Lord Red. 31.
(*m*) Barclay v. Russell, *ubi supra*.
(*n*) 1 Powl. Ex. Pr. 401; Peto v. Attorney General, 1 Y. & J. 509.
(*o*) Peto v. Att. Gen. 1 Y. & J. 509.

his discretion whether he will put in a full answer or not. (p) The usual course is for him to put in a general answer, stating merely that he is a stranger to the matters contained in the bill, and that he hopes the interest of the Crown will be taken care of. (q) In cases, however, in which the interest of the Crown, or the purposes of public justice require it, a full answer will be put in, (r) as in *Crawford* v. *The Attorney General*, (s) in which case the Lords of the Treasury had directed that the question might be brought before the consideration of a court of justice, and it would therefore have been unbecoming in the Attorney General to urge any matter of form which might prevent the case being properly submitted to the Court, before whom it was brought. (t)

In *Errington* v. *The Attorney General*, (u) the Attorney General being one of the defendants to a bill of interpleader, put in the usual general answer, upon which the other defendants moved that the bill might be dismissed, and the injunction dissolved, the Attorney General opposed the motion, and at the same time prayed that he might be at liberty to withdraw his general answer, and put in another, insisting *upon the particular right of the Crown to the money in question, which was granted. [*185]

The answer of the Attorney General is put in without oath, and is usually signed by him. And it seems that such an answer is not liable to be excepted to, even though it be to a cross bill, filed by the defendant in an information for the purpose of obtaining a discovery of matters alleged to be material to his defence to the information. We have, however, seen before, (x) that where a cross bill is filed against the Attorney General, praying relief as well as a discovery, he cannot protect himself from answering by means of demurrer; (y) but whether he could by such means protect himself from answering a mere bill of discovery, does not appear to have been decided; it is most probable that he might, and that the Court would in such a case, if a discovery were wanted from the Crown, put the party to prefer his petition of right. (z)

The right of the Attorney General to receive his costs, where he is made a defendant to a suit, has been before noticed; (a) it will suffice therefore here to repeat, that there seems to be no rule against the Attorney General receiving his costs, where he is made a defendant in respect of legacies given to charities; and that in *Moggridge* v. *Thackwell*, (b) costs were given to all parties, including the Attorney General, as between solicitor and client, out of the fund in Court. It appears also, that he frequently receives his costs where he is made a defendant in respect of the immediate rights of the Crown, in cases of intestacy. (c)

During the vacancy of the office of Attorney General, the Solicitor General may be made a defendant to support the interests of the Crown; (d) and it has happened, that where there has been an information by the Attorney General, the object of which has been to set up a general claim on behalf of the Crown at variance with the interests of a public charity, the Solicitor General has been made a defendant, for the purpose of supporting the interests of such charity against the general claim of the Attorney General.

(p) Davison v. Attorney General, 5 Price, 398, n.
(q) 1 Newl. 103.
(r) Colebrooke v. Attorney General, 7 Price, 192.
(s) 7 Price, 1.
(t) *Vide etiam* Deane v. Attorney General, *ubi supra*.
(u) Bunb. 303.
(x) *Supra*.
(y) Dean v. Attorney General, 1 Younge and C. 209.
(z) Ibid.
(a) *Ante*, p. 12, 13.
(b) 7 Ves. 88.
(c) Attorney General v. Earl of Ashburnham, 1 S. & S. 397.
(d) Lord Red. 81.

*SECTION III. [*186]

The Attorney General to the Queen Consort, and Prince of Wales.

The Queen Consort must be sued by her Attorney or Solicitor General, in the same manner as the King; and it is presumed that the Prince of Wales, as Duke of Cornwall, has the same prerogative, although no cases appear in the books wherein that point has been decided or discussed.

SECTION IV.

Corporations.

It has been stated before (*a*) that corporations aggregate must be sued by their corporate name; that is, if they are corporations existing by Royal charter, they must be sued by their name of foundation, though it has been said that if a corporation be known by a particular name, that it is sufficient to sue it by that name. (*b*) This, however, must be confined to the case of a corporation by prescription; for it is said that if a corporation is created by the King, and the commencement of it appear by the record, it can have no other name by use, nor be named otherwise than the King by his letters patent has appointed, and the Court will not permit it be sued by any other name.

A corporation aggregate which has a head, cannot be sued without it, because without its head it is incomplete. (*c*) It is not however necessary to mention the name of the head; (*d*) nor is it in general proper to make individual members of aggregate corporations parties by their proper Christian and surnames, though cases may occur where this will be permitted for the purpose of compelling a discovery from them of some fact which may rest in their own knowledge. Thus in the *case put by Lord Eldon, in *Dummer* v. *The Corporation of Chippenham*, (*e*) of an individual corporator whose [*187] estate was charged with a rent or payment to a charitable institution, of which the corporation had the management, and who had obtained possession of the deed, his Lordship was of opinion that upon an information for the purpose of having the estate of the charity properly administered by the corporation, it would be perfectly competent to call upon the mayor, if he was the individual implicated in that conduct, not only to answer with the rest under their common seal, but also to answer as to the circumstances relative to the deed supposed to be in his hands. So also in the principal case, which was that of a bill by a schoolmaster against a corporation (*f*) who were trustees of a charity, to be relieved against a resolution of the trustees by which he was deprived of his office of schoolmaster, on the ground that the resolution had been pronounced by five of the members of the corporation, from improper motives with reference to a parliamentary election, to which bill the five members were made parties, for the purpose of obtaining from them an answer upon oath as to their alleged improper conduct, a demurrer which had been put in by these five members, on the ground that no title was shown to the discovery against them, was over-ruled by Lord Eldon.

(*a*) *Ante*, p. 25.
(*b*) Bro. Corp. 40.
(*c*) 2 Bac. Ab. tit. Corp. [E.] e; pl. 2.
(*d*) 3 Salk. 103; 1 Leon. 307.
(*e*) 14 Ves. 255.
(*f*) Dummer v. The Corporation of Chippenham, *ubi supra*.

The practice of making the officers or servants of a corporation parties to a suit for the purpose of eliciting from them a discovery upon oath of the matters charged in the bill, has been too frequently acted upon and acknowledged, to be now a matter of doubt. The first case which occurs upon the point is an anonymous one, in 1 Vernon, (*g*) where a bill having been filed against a corporation to discover writings, and the defendants answering under their common seal, and not being sworn, would answer nothing to their prejudice, it was ordered that the clerk of the company and such principal members as the plaintiff should think fit, should answer on oath, and that the Master should settle the oath; and so in the case of *Wych* v. *Meal*, (*h*) where a bill was [*188] brought against the East India *Company, and one of the officers of the company was made a defendant in order to discover some entries or orders in the books of the defendant, a demurrer by the officer was over-ruled. The same point was also determined in *Moodaley* v. *Morton*, (*i*) in which case it was held that if a person has reason to suspect that he has sustained an injury by persons acting under the authority of a corporation, but cannot ascertain how far they are concerned, he may file a bill against them and their secretary or other officer, for a discovery, before he brings an action at law, suggesting that he intends to bring one, but cannot do it without the discovery prayed, because, as the suit against a corporation is by original, the discovery may be necessary before he can sue out the writ. In such case, however, if the discovery would be prejudicial to the corporation, and not be necessary to the plaintiff's case, the officer need not discover those facts. (*k*)

It may be observed here, that where the officer of the corporation from whom the discovery is sought is a mere witness, and the facts he is required to discover are merely such as might be proved by him on his examination, he ought not to be made a party. Thus, where an officer of the Bank of England was made a party, for the purpose of obtaining from him a discovery as to the times when the stock in question in the cause had been transferred, and he demurred to the bill, the Vice Chancellor, (Sir J. Leach) allowed the demurrer, on the ground that the officer was in that case merely a witness. (*l*)

[*189] *But although it is not an unusual practice to make the clerk or other principal officer of a corporation a party to a suit against such corporation, for the purpose of eliciting from him a discovery of entries or orders in the books of the corporation, yet where such is not the case, it is still the duty of the corporation, when informed by the information of the nature and extent of the claims made upon them, to cause diligent examination to be made before they put in their answer, of all deeds, papers and muniments in their possession or power, and to give in their answer all the information derived from such examination; and it was said by Sir J. Leach, M. R., that if a corporation pursue an opposite course, and in their answer allege their ignorance upon the subject,

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(*g*) Page 117. (*h*) 3 P. Wms. 310.

(*i*) 1 Bro. C. C. 469. It should be observed here, that Lord Eldon, in Dummer v. The Corporation of Chippenham, *ubi supra*, mentioned it as his opinion, that the case of Steward v. The East India Company, 2 Vern. 380, in which a demurrer to a bill against the Company and one of its servants, is reported to have been allowed, is a misprint; and that instead of stating that the demurrer was allowed without putting them to answer as to matter of fraud and contrivance, which is nonsense, it should have been, that the demurrer was disallowed, with liberty to insist by their answer that they should not be compelled to answer the charges of fraud, &c.; but may it not have been that the bill, which was against arbitators as well as the servants of the Company, and who all joined in demurring, contained an allegation of fraud and contrivance, and that one of the questions argued had been whether, although they had demurred to the bill, they ought not to have supported their demurrer by an answer denying the allegations.

(*k*) 2 Bac. Ab. Corp. 13, 2. (*l*) How v. Best, 5 Mad. 19.

and the information required is afterwards obtained from the documents scheduled to their answer, the Court will infer a disposition on the part of the corporation to obstruct and defeat the course of justice, and on that ground will charge them with the costs of the suit. (*m*)

Where a suit is instituted against a corporation sole, he must appear and defend, and be proceeded against in the same manner as if he were a private individual. But where corporations aggregate are sued in their corporate capacity, they must appear by attorney, and answer under the common seal of the corporation; but if those of which the corporation consists be charged as private individuals, they must answer upon oath.

If the majority of the members of a corporation are ready to put in their answer, and the head or other person who has the custody of the common seal refuses to affix it, application must be made to the Court of King's Bench for a *mandamus* to compel him, and in the meantime the Court of Chancery will stay the process against the corporation. (*n*)

A corporation aggregate being an ideal and invisible person, existing only in contemplation of law, cannot be attached or apprehended; the proceedings against them, either for the *purpose of compelling an appearance or an answer, are therefore commenced by distraining the property of the corporation. [*190]

For this purpose a writ of *distringas* is the first process. It is a writ issuing out of the Court of Chancery, directed to the sheriff, commanding him to distrain the land, goods and chattels of the corporation, so that they may not possess them till the Court shall make other order to the contrary, and that in the meantime he (the sheriff) do answer to the Court for what he so distrains, so that the defendant may be compelled to appear in Chancery, and answer the contempt. Upon this writ, if the corporation has property, the sheriff usually levies 40*s.* only, and makes his return accordingly; and if this execution does not procure the obedience of the corporation, an *alias distringas*, which is a writ commanding the sheriff again to distrain the goods and chattels, lands and tenements of the corporation, may be obtained. Upon this writ the sheriff usually levies 4*l.*, and if after that the corporation still continue disobedient a *pluries distringas* issues. There must be fifteen days between the *teste* and return of each of these writs. If the last-mentioned *distringas* fails of effect, upon the *pluries distringas* being returned by the sheriff, a commission of sequestration may be obtained against the corporation. This commission is usually directed to five persons named by the plaintiff, directing them to sequester the goods and chattels, the rents and profits, and real estate of the corporation, until they shall appear or answer the plaintiff's bill, or the Court make further order to the contrary. A sequestration cannot be discharged till the corporation have performed what they are enjoined to do, and paid the costs of the several *distringases*, and of the sequestration, including the commissioner's fees; but upon their doing this they may upon motion get the sequestration discharged.

After a sequestration has been issued against a corporation, the plaintiff may, if he please, set down the cause to be heard, and have the bill taken *pro confesso* against them, in the same way as may be done in the case of an ordinary person.

In *Curzon* v. *The African Company*, (*o*) the Lord Keeper *(North) is reported to have said, that he did not see how a company who had no property, could be compelled to appear; in answer to which it was said in argument, that in such a case the plaintiff might sue out a *distringas* against the company, and have it returned *nihil*, and so get sequestra- [*191]

(*m*) Attorney General v. The Burgesses of East Retford, 2 Mylne & K. 35.
(*n*) Rex v. Wyndham, Cowp. 377; 2 Bac. Ab. tit. Corp. 13.
(*o*) 1 Vern. 132.

tion against them, and then by the course of the Court the plaintiff need not bring them to a hearing; but in the case of *Salmon* v. *The Hamborough Company*, (*p*) another method was adopted to compel the appearance of a corporation which had no property by which they could be distrained. The bill was filed to recover payment of a sum of money which had been lent to the Company by the plaintiff, and alleged that the Company had been incorporated by letters patent, and had power to make bye-laws, and to assess rates upon cloths, &c. (which was the commodity they dealt in,) and by poll to defray the necessary charges of the Company, and that the Company had imposed rates accordingly, and that they thereby had got great credit, and had borrowed great sums of money under their common seal, and particularly that the plaintiff had lent them money upon that security many years since. The bill went on to charge, that the company having no common stock, the plaintiff had no remedy at law for his debt; but charged, that the usage had been to make taxes and levy actions upon their members, to bear the charges of their Company and to pay their debts, but that the Company now refused to execute that power; and alleged, that divers members of the corporation, who were made defendants by name, refused to meet for the purpose of laying taxes, &c.

To this bill the corporation, upon being served with process, and having nothing by which they could be distrained, refused to appear; but the individual members of the Company who were served, appeared, and demurred to the bill. The demurrer upon argument was allowed, and the bill was dismissed as to those defendants; whereupon a petition of appeal was preferred to the House of Lords, admitting, that in the ordinary course of proceeding in Chancery, that Court could not help the plaintiff, but suggesting that in cases [*192] of this description the House of *Lords had given special directions to the Court of Chancery to relieve, which it had accordingly done, and citing two precedents against companies in London for that purpose.

To this petition the defendants particularly named put in an answer, plea and demurrer; but the Company, though several times summoned, did not appear; and after hearing the appeal in their absence, the House of Lords ordered that the dismission should stand reversed, and that the Lord Chancellor should retain the bill, and that the Court of Chancery should issue forth the usual process of that Court, and if cause be, process of *distringas* thereupon against the said corporation, provided the said process be served one month before the return thereof; and if upon return of the said process the said corporation should not file an appearance, or should appear and not answer, the said bill should be taken *pro confesso*, and a decree should thereupon pass; but in case the said corporation should appear and answer within the time aforesaid, then that the Court of Chancery should proceed to examine what the plaintiff's just debt was, and should decree the said Company to pay so much money as the same should appear to amount unto, with reasonable damages; and in case the corporation should not pay the sum decreed within ninety days after the service of the said decree upon their governor, deputy governor, treasurer, clerk or secretary for the time being, then that the Lord Chancellor or Lord Keeper for the time being should order and decree that the governor or deputy governor, and the twenty-four assistants of the said Company, or so many of them as by the tenor of their charter constituted a quorum for the making of leviations upon the trade or members of the said Company, should within such time as by the Lord Chancellor or Keeper should be thought fit, make such a leviation upon every member of the said Company as was contributary to the public charge, as should be sufficient to satisfy the said sum to be decreed to the plaintiff in

(*p*) 1 Chan. Ca. 206–7.

that cause, and to collect and levy the same, and to pay it over to the plaintiff as the Court should direct; and such a leviation was to be put into writing, and signed with the hand of the governor, deputy governor and assistants of the aforesaid Company for the time being, and so many of them as by the constitution of *the said charter made a quorum; and in case they should [*193] not make or return such leviations as aforesaid, then it was ordered that the Lord Chancellor or Lord Keeper might issue process of contempt against them as is usual against persons in their natural capacity, and if by the said time so to be limited by the said Court of Chancery the said money so to be assessed should not be paid, then and from thenceforth every person of the said Company upon whom such a leviation should be made was to be liable in his natural capacity to pay his *quota* or proportion assessed. And the Lord Chancellor or Lord Keeper was to order or decree, that such process should issue against any such member so refusing or delaying to pay his *quota* or proportion, as is usual against persons charged by the decree of the said Court for any duty in their several capacities. And if the total so returned and filed with the register should not amount to so much as should be sufficient to satisfy the sum decreed, with respect had to such persons as should make it appear that they were overcharged, or ought not to be charged at all, then the said Lord Chancellor or Lord Keeper for the time being might from time to time order that a new leviation should be made and returned into the registers of the Court of Chancery, of such sum as should be sufficient by way of supplement for that purpose, to the payment whereof every individual person was to be bound in such manner as aforesaid.

It appears by the same Report, that afterwards, upon a motion grounded on the above order, the Court ordered the dismission of the bill to stand reversed, and the bill to be revived, and that process and other proceedings issued as was thereby directed. Accordingly, the treasurer and secretary were served with a *distringas* against the Company, and a copy of the Lords' order, to which the sheriff returned *nulla bona*, and no appearance was made. The cause was afterwards heard, and the bill taken *pro confesso* against the corporation, and the defendants were decreed to pay the plaintiff's debt according to the Lords' order.

The same process of *distringas* and sequestration issue to compel the performance of an order or decree against a corporation, as to compel an answer. Upon service of the writ of *execution of the decree and default, [*194] a *distringas* issues without order. (*q*) The form is the same as that of a *distringas* to compel appearance or answer, but the indorsement explains the purpose. (*r*) Upon the return of the *distringas* an order may be obtained for a sequestration as of course, without suing out an *alias* or a *pluries* as *upon mesne process*. (*s*) In such case, however, the order is only an order *nisi* in the first instance, and may be had upon a motion of course. If there is any irregularity in the form of the proceedings, the defendants may avail themselves of it on showing cause against making the order absolute, and not by moving to appear to the *distringas*, and then moving to discharge the sequestration. If no irregularity is shown in the process, the order is made absolute upon motion. (*t*)

Payment of costs may be enforced against a corporation by the same process as the decree, except that a *subpœna* issues in the first instance instead of a *writ of execution*. (*u*) It is to be observed, that in the order made in the case

(*q*) 1 Har. 149; Harvey v. East India Company, Prec. Ch. 129; 2 Vern. 395.
(*r*) Lowten v. Mayor of Colchester, 3 Mer. 543.
(*s*) Ibid. (*t*) Ibid.
(*u*) Lowten v. Mayor of Colchester, 3 Mer. 546, n.

of *Lowten* v. *The Mayor of Colchester*, (*x*) it appears that the *subpœna* for costs was issued in pursuance of an order obtained for that purpose; there is, however, no occasion for such an order, as a *subpœna* for costs issues without order. (*y*)

If a corporation aggregate omit to put in an examination to interrogatories exhibited under a decree, or if they put in an insufficient examination, an order may be obtained for a sequestration, unless the examination is put in within four days, which upon default will be made absolute. (*z*)

The examination of a corporation, like its answer, must be under the common seal.

It should be stated here, that by the Act of 6 Geo. 4, c. 91, before referred to, (*a*) it is amongst other things enacted, that in any charter hereafter to be granted by His Majesty, his *heirs or successors, for the incorporation of any company or body of persons, it shall and may be [*195] lawful in and by such charter to declare and provide, that the members of such corporation shall be individually liable in their persons and property for the debts, contracts and engagements of such corporations, to such extent, and subject to such regulations and restrictions as His Majesty, his heirs or successors may deem fit and proper, and as shall be declared and limited in and by such charter; and the members of such corporation shall thereby be rendered so liable accordingly. By the subsequent Act, 4 & 5 Will. 4, c. 94, also mentioned in a preceding chapter, (*b*) as having been passed to enable His Majesty to invest trading and other companies with the powers necessary for the due conduct of their affairs, and for the security of the rights and interests of their creditors, power has been given to His Majesty, by letters patent under the Great Seal of the United Kingdom of Great Britain and Ireland, or in Scotland under the Seal appointed by the Articles of Union to be used, instead of the Great Seal thereof, to grant to any company or body of persons associated together for any trading, charitable, literary or other purposes, and to the heirs, executors, administrators and assigns of any such persons, although not incorporated by such letters patent, the same privileges which according to the rules of the common law, or in pursuance of the above Act of the 6 Geo. 4, c. 91, it would be competent to His Majesty to grant to any such company or body of persons, in and by any charter of incorporation, and especially the privilege of maintaining and defending actions, suits, prosecutions and other proceedings, both at law and in equity, in the name or names of any one or more of the principal officers for the time being of any such associations respectively. And it is provided, that in all cases where such letters patent shall be granted to such company or body of persons, it shall be lawful in all suits or proceedings in equity commenced or instituted *against the principal officer* or officers of such company or body of persons, to join, for the purpose of discovery in such suits or proceedings, any member or members of such *company, as the nominal defendant or defendants [*196] for or on behalf of such company or body of persons, subject to the payment by the plaintiffs of such costs as the Court in which such proceedings may be had shall in that behalf order or direct.

By the third section it is enacted, that any decree, judgment, order or interlocutor made or pronounced in any action, suit or proceeding in any Court of

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(*y*) Seaton on Decrees, 430.
(*z*) Attorney General v. Corporation of Winchester, Seton, 428–430.
(*a*) *Ante*, p. 31. (*b*) *Ante*, p. 31.
(*x*) *Ubi supra*.

Law or Equity against any officer of any such company, body or association named as aforesaid, shall have the like effect and operation upon and against the property, funds and effects of such company, body or association, and upon and against the persons and property of every and any member thereof, as if such company, body or association, and such member or members thereof, had been a party or parties to such action, suit or proceeding, and as if such decree, judgment, order or interlocutor had been pronounced against such company, body or association, or against every or any such member or members thereof: Provided that no diligence or execution shall pass or be issued thereon without leave first granted in open court by the Court in which such decree, judgment, order or interlocutor was made or pronounced, and which motion shall be made on notice to the person or persons sought to be charged; nor after the expiration of three years next after such person or persons shall have ceased to be a member of such company, body or association. And by the fourth section it is provided, that the principal officer or officers for the time being of such company or body of persons to whom such letters patent shall be granted, shall, in the first week of the month of June and in the first week of the month of December in each year during the continuance of such letters patent, cause a true list of the names of all the then existing members of such company or body of persons, with their respective places of abode and description, to be filed with the clerk of the patents, and that the same shall be open for inspection at all reasonable times by any person requiring the same. (c)

*No decision has yet been come to by the Courts upon any point of practice relating to corporations or joint stock associations formed [*197] under the sanction of the preceding Acts of Parliament; it is however presumed, that in all suits commenced against the officers of associations established under the authority of the latter Act, the proceedings must be the same as they would be in case the same person were sued in his individual capacity.

With respect to proceedings against joint stock companies existing under private Acts of Parliament, they must depend entirely upon the provisions of the Act under which they are constituted; nothing can therefore be added in this place, beyond calling the reader's attention to the observation of Lord Eldon upon these companies, in his judgment in *Van Sandau* v. *Moore*, (d) which has been before noticed, and to the observations already made in treating of suits instituted on behalf of this description of associations. (e)

In pursuance of the arrangement suggested in the commencement of this Chapter, the reader's attention will be here called to the peculiarities of practice consequent upon making certain corporations parties to a suit, who, although they have no interest in the subject-matter, are nevertheless sometimes brought before the Court in respect of their situation as managers of certain public stocks, the management of which has been entrusted to them by different Acts of Parliament. These corporations are the Bank of England, the East India Company, and the South Sea Company.

The Governor and Company of the Bank of England, the United Company of Merchants trading to the East Indies, and the Governor and Company of Merchants of England trading to the South Seas or other parts of America, may be made parties to a suit relating to any public stock standing in their

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(c) For the remaining clauses of this Act, as far as relates to registering and advertising the grants of letters patent made in pursuance thereof, and to the advertising the appointment, death, &c. of the officers, *vide ante*, p. 32.

(d) 1 Russell, 441–458. (e) *Ante*, p. 20.

books, for the purpose of compelling or authorizing such companies to suffer a transfer of such stock to be made in their books, and also of praying an injunction against their *permitting such transfer; and formerly it appears to have been the practice to make them parties in all cases of that description, and an opinion stated to have been expressed by Lord Kenyon, that notice to the Bank without more would operate as an injunction, was denied by Lord Eldon in *Temple* v. *The Bank of England*, (*f*) who observed, that the Bank would never admit that, even upon a *subpœna* and bill filed.

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In order to save the expense of making these companies parties, an Act of Parliament was passed, 40 Geo. 3, c. 36, whereby it is enacted, that it shall be lawful for any of His Majesty's Courts of Equity, before or upon hearing any cause depending therein, to order the Governor and Company of the Bank of England to suffer a transfer of stock standing in their books to be made, or to pay any accrued or accruing dividends thereon, belonging to or standing in the names of any party to a suit, as such Courts may deem just, or to issue an injunction to restrain them from suffering any transfer of such stock, or from paying any dividends or interest accruing or accrued thereon, although such Governor and Company are not parties to the suit in which such decree or order shall be made, such Courts being satisfied by the certificate of the accountant of the said corporation, duly signed by him as thereinafter is directed that the stock required to be transferred is standing in their books in the names of the persons or person required to transfer the same, or of the persons or person to whom they or he are or is the legal representative; and that after due service of a short order upon the said Governor and Company, or their proper officer, which shall contain no recital of the pleadings or other matter than the title of the cause and the ordering part of such decree or order which respects the said Governor and Company, and for which the sum of 18*s*. and no more shall be paid, like process shall issue to enforce such order or decree as to enforce them against any party to a suit depending in such Court. And for the better enabling any party to a suit to obtain and produce such certificate in Court, it is enacted, that upon request in writing, signed by the clerk in Court, (or other officer answering thereto) and the *solicitor concerned in the cause for the party applying, which shall state the cause, and for what parties they are concerned, the Governor and Company of the Bank of England shall deliver or cause to be delivered to the said clerk in court or other officer, and solicitor, or one of them, a certificate signed by their accountant, stating the amount of such stock or dividends, and in whose names or name such stock is standing in their books, and if it be particularly required, (but not otherwise) when such stock or any part thereof was transferred, and by whom; for the signing of which request in writing there shall be paid to such clerk in court or other officer a fee of 6*s*. 8*d*. and no more; and to such solicitor for the drawing, copying, and delivering of the same at the Bank, a fee of 13*s*. 4*d*. and no more; and to the officer making out and delivering such certificate, a fee of 2*s*. 6*d*. and no more; it is provided nevertheless, that nothing therein contained shall extend to any case where any further discovery is wanted than is thereinbefore expressly mentioned, nor to any case where the said Governor and Company claim any interest in or lien upon the said fund, but that in such cases it shall be necessary to make them a party to such suit, as if the Act had never been made; and that if any special matter shall arise which in the opinion of the said Governor and Company shall effect their interests, or which may be objected against suffering such transfer of stock, &c., it shall be lawful for them to state

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(*f*) 6 Ves. 770, 772.

such matter to the Court, by motion or petition in such suit, and that execution of process to compel such transfer, &c., shall be suspended until final order shall be made thereon.

By the third section it is enacted, that in all suits *then depending* in which the said Governor and Company may have put in their answer, not claiming any interest in or lien upon the stock required to be transferred, no further proceedings shall be had against them as a party to such suits, but that the bills shall stand dismissed as against them in such suits; and that in all such suits an order may be made, upon motion or petition as of course, for the taxing of their costs already incurred, and for immediate payment thereof by the plaintiffs in any such suits or any of them, subject however to any further order as between the other parties to such suits *respecting the final payment of such costs, as by the Court in which any suit may be [*200] depending shall be deemed just. And it is by the fourth section further enacted, that all the several regulations and provisions thereinbefore enacted shall extend, *mutatis mutandis*, to every case where the United Company of Merchants of England trading to the East Indies, or the Governor and Company of Merchants of Great Britain trading to the South Seas or other parts of America, have any stock standing in the books of such respective corporations which may now be or hereafter may become the subject of any suit in equity or incidental thereto, saving to the said corporations respectively the like right of being made a party, by applying by motion or petition in such suits, as is before reserved or given to the Governor and Company of the Bank of England.

By a singular mistake in penning the third section of the above Act, the latter words of the section are not prospective, only extending to causes then depending; the consequence is, that the above-mentioned public bodies may still, if the plaintiff thinks proper, be made parties to a suit, and demurrers by them will be overruled. (*g*) Some check, however, is provided for an abuse of this power, by a declaration of Sir John Leach, V. C., that where the Bank has been *unnecessarily* made a party, the bill will be dismissed as against it, with costs to be personally paid by the plaintiffs. (*h*) Where, however, the Bank were necessarily made parties for the security of a legacy, their costs were ordered to be paid out of the capital of the legacy. (*i*)

Although it is stated above that the opinion expressed by Lord Kenyon, that notice to the Bank, without more, would operate as an injunction to restrain them from permitting the transfer of stock, was denied by Lord Eldon, yet it seems that where the Bank has been made a party to a suit, praying an injunction to restrain them from permitting a transfer or payment of dividends, a notice served upon them, stating that a bill had been filed, and what the object was, accompanied by a *subpœna*, will have the effect of an injunction to restrain the transfer; (*k*) and that in such case if the plaintiff *in the cause does [*201] not move for an injunction in proper time, the other defendants, in whose names the stock stands, may apply to the Court to permit the Bank to make a transfer, which it will order to be done after a certain day, unless in the meantime the Court shall grant an injunction to restrain such transfer. (*l*) It seems, however, that an application to this effect cannot be made on behalf of the Bank; and that if the Bank are, in consequence of their refusal to permit a transfer, threatened with an action at law, they must file a bill of interpleader against the plaintiffs at law, and the other parties claiming an interest in the pro-

(*g*) Temple v. Bank of England, 6 Ves. 770; Attorney General v. Gale, ib. n.
(*h*) Edridge v. Edridge, 3 Mad. 386; Skrymsher v. Northcote, ib. n.
(*i*) Hammond v. Neame, 1 Swan. 35. (*k*) Ross v. Shearer, 5 Mad. 458.
(*l*) Ross v. Shearer, 5 Mad. 458.

perty, (*m*) otherwise the Court would in fact give the plaintiff an injunction, at the request of a defendant who had no interest in the question. (*n*)

Before the passing of the above-mentioned Act, an injunction against the Bank could not be granted by the Court unless upon notice, nor till after the other defendants had appeared or were in contempt, (*o*) unless in the case of some special emergency, which rendered it impossible to serve notice; and it seems that the same practice has continued since the Act, and that an application to restrain the Bank from making a transfer, without making them parties, must be after notice to the other defendants, unless where from the necessity and urgency of the case notice cannot be given, in which case the application must be upon affidavit, verifying that such urgency and necessity exist. (*p*)

Where a transfer of stock, or payment of dividends, is sought to be restrained, the usual mode of proceeding is to obtain a *distringas* from the Court of Exchequer against the Bank, and to serve it upon the secretary of the Bank of England, accompanied by a notice that the object of the *distringas* is to prevent the transfer of the stock, or payment of the dividends, &c., described in the notice. This will have the effect of restraining the transfer or receipt for a limited time, within which a bill may be filed for an injunction, &c.

[*202] *If no bill is filed after service of the *distringas*, the Court of Exchequer will, upon motion by the party seeking to make the transfer, set aside the *distringas*, with costs to be paid by the party at whose instance it has been issued. (*q*) It is, however, the usual practice of the Bank to give notice to the party issuing the *distringas*, that unless a bill is filed and an injunction obtained before a certain day, they will permit the transfer.

It seems that in strictness, after a *distringas* has been issued, the bill ought to be filed in the Court of Exchequer, and that to issue one with intention of afterwards filing a bill in the Court of Chancery, is an improper use of the writ; (*r*) and upon this ground, where in the course of hearing a motion it appeared from the affidavits filed on the part of the plaintiff that the *distringas* had been issued for the purpose of restraining the transfer of stock till a bill could be filed in the Court of Chancery, Lord Lyndhurst, L. C. B., made an order to set aside the *distringas* with costs, in the same terms as the order in *Scott* v. *The Bank of England.* (*s*)

It is to be observed here, that the Bank of England is not bound to take notice of any trust affecting public stock standing in their books; all that they have to do is to look to the legal estate; and therefore, if the person entitled to the legal estate applies for a transfer to himself, the Bank must permit the transfer, and are not bound to look further to see whether the stock is trust stock. Upon this ground, where a bill was filed against the Bank, to compel them to make good the deficiency in a sum of stock which had been specifically bequeathed to a trustee, who was also the executor, and which had been transferred to the trustee and executor, and afterwards sold out by him, it was dismissed as against the Bank. (*t*) Upon the same principle, where the Bank filed a bill against the executors of a will, to restrain their proceeding in an action brought

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(*m*) Birch v. Corbin, 1 Cox, 144.

(*n*) With respect to the right of the Bank of England to apply to a Court of Equity to restrain any action brought against it by an executor or other person having a *legal* right to call for a transfer of funds, *vide* Bank of England v. Lunn, 15 Ves. 569, and the cases there cited.

(*o*) Doolittle v. Walton, 2 Dick. 442.

(*p*) Hammond v. Mundrell, 6 Ves. 773, n.

(*q*) Scott v. Bank of England, 2 Younge & J. 327.

(*r*) Fellows v. Bank of England, 1 Younge, 385.

(*s*) 2 Younge & J. 327.

(*t*) Hartga v. Bank of England, 3 Ves. 55.

by them against the Bank, in consequence of their refusal to permit a transfer to the executors of stock, part of the testator's residuary estate, which had been bequeathed to *them upon certain trusts, the injunction was dis- [*203] solved, on the ground that the Bank had a good defence at law. (u) In a subsequent case, where a similar bill was filed by the Bank, to restrain an action by the executors, the order made was, that the Bank permitting the transfer, and *paying to the defendant the costs at law and in equity*, the action should be discontinued. (x)

It is to be observed, however, that by the 6 Geo. 1, st. 2, c. 19, s. 90, by which the management of the public stocks or annuities was first given to the Governor and Company of the Bank of England, the stock created by that Act was declared to be personal estate; and by the 12th section of the same Act it was provided, that any person possessed of such stock or annuities might devise the same by will in writing, attested by two or more credible witnesses; but that such devisee shall receive no payment thereupon till so much of the will as relates to the stock or annuity be entered in the proper office at the Bank; and that in default of such transfer or devise, the stock or annuities were to go to the executors or administrators. These clauses have been repeated in all subsequent Acts creating stocks of this nature, and have given rise to considerable discussion, as to whether the Bank are bound to take notice of a specific devise of stock, attested by two witnesses, and registered according to the provisions of the Acts, and whether they are justified in resisting a claim to such stock set up by the executor. This appears to have been first discussed in the case of *Pearson* v. *The Bank of England*, (y) in which a sum of stock had been bequeathed to the plaintiff, who was also executor of the will, for life, and after his decease to Mr. White absolutely, who afterwards, for a valuable consideration, by deed, bargained and sold all his interest in the stock to the plaintiff. The bequest had been duly registered according to the Act, and on application made to the Bank by the plaintiff and White to transfer the stock to the plaintiff, they refused, and the bill was filed by the plaintiff and White against the Bank, to compel them to make the *transfer; it also [*204] prayed that the Bank might pay the costs of the suit. It was insisted on the part of the Bank, that unless by transfer *inter vivos*, or by devise by will properly attested, stocks were not properly assignable; that it could not be expected the Bank would take upon itself the hazard of determining the consequences of private transactions between parties interested in the fund; and that if those parties dealt with their stock in any other manner than those prescribed by the Acts of Parliament, the Bank could act only under the decrees of courts of competent jurisdiction. Upon hearing the case, Lord Thurlow was of opinion, that the devise of the stock was, under the Acts in question, in the nature of a Parliamentary appointment, (z) and did not want the assent of the executor, and that being so, the practice of the Bank seemed strictly right, and he accordingly gave them their costs. The same rule was subsequently followed by Lord Loughborough, in *Marryatt* v. *The Bank of England*, and in *Aynsworth* v. *The Bank of England*, (a) and also by Sir W. Grant, in *Austin* v. *The Bank of England*. (b) Where, however, a bill had been filed by the Bank, to restrain an action which had been brought against

(u) Bank of England v. Moffat, 3 Bro. C. C. 260; 5 Ves. 668, and note.
(x) Bank of England v. Parsons, 5 Ves. 665.
(y) 2 Bro. C. C. 529: 2 Cox, 175, S. C. (z) Cox, 179.
(a) 8 Ves. 524, n. b. (b) 8 Ves. 522.
(c) Bank of England v. Lunn, 15 Ves. 581.
(a) Lord Red. 23.
(b) Countess of Portland v. Prodgers, 2 Vern. 104.

them by the executor, in consequence of their refusal to permit the transfer of stock which had been specifically bequeathed, Lord Eldon allowed a demurrer to the bill, on the ground that there was no foundation for the interference of a Court of Equity, for if the executor could not maintain an action at law, the plaintiffs did not want the protection of the Court, and if he could maintain an action, then the true construction of the Act of Parliament authorized or did not prevent that action, and if so there was no equity. (c)

[*205] *SECTION V.

Married Women.

It is a rule, both of law and equity, that where a suit is instituted against a married woman, her husband must also be a party, unless he is an exile or has abjured the realm, (a) in which case the wife is considered in all respects as a *feme sole*, (b) and may be made a defendant without her husband being joined; (c) which it seems she also may if her husband is an alien enemy. (d) It appears also, that in certain cases a husband may, in equity, make his wife a defendant, (e) as where she has before marriage entered into articles concerning her own estate, she is considered to have made herself a separate person from her husband, and in such a case, upon a motion by the husband to commit her for not answering interrogatories, she was ordered to answer within a week, &c. (f) A husband, however, cannot make his wife a defendant in order to have from her a discovery of his own estate. (g)

But although a wife cannot, except in certain instances which have been pointed out, be made a defendant to a suit without her husband being joined as a co-defendant, yet there are cases in which, although the husband and wife are both named as defendants, the suit may be proceeded with against the wife separately. Thus, if the suit relates to the wife's separate property, and the husband be beyond seas and is not amenable to the process of the Court, the wife may be served with a *subpœna* and compelled to answer the bill. In *Dubois* v. *Hole*, (h) a bill was filed against a man and his wife for a demand out of the separate estate of the wife, and the husband being abroad the wife was served with a *subpœna*, and upon non-appearance was arrested upon an attachment, and having stood out all the usual process of contempt, the bill was taken *pro confesso* against her. (i) It is to be observed, that in [*206] order to entitle the plaintiff to compel the wife to answer separately, the husband must be actually out of the jurisdiction, and that the mere circumstance of his being a prisoner in the King's Bench prison, will not be a sufficient ground for obtaining an order for a separate answer. (j)

The case in which the Court compels a woman to appear and defend separately from her husband, is where the demand is against her in respect of her separate estate, and the husband is only named for conformity and cannot be affected by the decree; but where there is no separate property belonging to the wife, she cannot be proceeded against without her husband, unless indeed she

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(c) 1 Inst. 132 b, 133 a.
(d) Deerley v. Duchess of Mazarine, Salk. 116.
(e) Brooks v. Brooks, Prec. Ch. 24. (f) Ibid.
(g) Ibid. (h) 2 Vern. 613.
(i) 2 Vern. 614, in *notis*; *vide etiam*, Bell v. Hyde, Prec. Ch. 328, and the other cases there cited.
(j) Anon. 2 Ves. jun. 332.

has appeared and prayed permission to answer separately, in which case she will be liable to the usual process of contempt if she does not put in her answer in conformity with the order which she herself has obtained. (*k*)

It is to be observed here, that a *feme covert* administratrix is not considered as having a separate property in the assets of her intestate, (*l*) and upon this ground Lord Eldon, in *Pannell* v. *Taylor*, (*m*) held, that a writ of *ne exeat regno* against a married woman sustaining that character, could not be maintained. In that case his Lordship had originally granted the writ, upon the authority of *Moore* v. *Meynell* (*n*) and *Jernegan* v. *Glasse*, (*o*) but upon a motion being subsequently made on behalf of the defendant to discharge the writ, his Lordship was of opinion that it could not be maintained, observing, that if he had been apprised of the circumstances of the case of *Moore* v. *Meynell* (upon the authority of which Lord Hardwicke appears to have acted in *Jernegan* v. *Glasse*,) he should not have granted the writ.

The circumstances in *Moore* v. *Meynell*, of which Lord Eldon in his judgment stated himself to have been ignorant at the time when he originally granted the writ, appeared by the decree, and were, that the *feme covert* had a large separate property, and that she had executed bonds, from which it *seems to have been contended that she had rendered her [*207] separate estate liable to the payment of her debts. (*p*)

It is to be observed, that in *Pannel* v. *Taylor*, Lord Eldon remarked, that there might be a very great difference between the case of a married woman who has separate property, and the case of a married woman who is administratrix. As administratrix, his Lordship said, she can have no property at all, and has no power to act without her husband. This distinction, however, does not appear to have been attended to in some previous cases, in which Sir John Leach, V. C., appears to have granted attachments against *femes covert* administratrix, where their husbands were abroad. The first case was *Bunyan* v. *Mortimer*, (*q*) where a bill was filed against a husband and wife in respect of a demand on the wife as executrix of a deceased person, and the husband having gone abroad after appearance for himself and wife, an attachment was issued against him, and a motion was made for leave to issue an attachment against the wife, when his Honor said, that the proper course was, to move that the wife might answer separately, and that notice of that motion must be given to the wife. The second case was that of *Bushell* v. *Bushell*, (*r*) where an order for an attachment was applied for and obtained against a married woman, for want of appearance to a *subpœna* against her and her husband, which in consequence of the husband being abroad had been served upon her alone. It does not, however, appear, from the report of the case, in what character the wife was made a party to the proceeding.

Where a husband and his wife are living separate from each other, the husband will not be answerable for the *tortious* act of his wife, and the wife may be compelled to answer apart from her husband; thus in *Plomer* v. *Plomer*, (*s*) where the plaintiff being about to pay a debt of 100*l.* due by him to Lady Plomer, Margaret Smith, her daughter, snatched 20*l.*, part of the money, and

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(*k*) Powell v. Prentice, Ridg. 258.
(*l*) *Vide infra.*
(*m*) 1 Turn. & R. 96.
(*n*) 1 Dick. 30.
(*o*) 1 Dick. 107; 3 Atk. 409; Amb. 62, and 1 Turn. & R. 97, n. b.
(*p*) In a subsequent case, Moore v. Hudson, 6 W. Mad. 218, Sir John Leach granted two separate writs of *ne exeat*, one against the man, and the other against his wife, who was an executrix, the plaintiff undertaking not to issue more than one of the writs.
(*q*) Mad. & Geld. 278.
(*r*) 1 S. & S. 164.
(*s*) 1 Ch. R. 68.

[*208] went away therewith, and afterwards *Lady Plomer brought an action against the plaintiff to recover the 20*l.*; whereupon the plaintiff filed a bill against Lady Plomer and against Margaret Smith and her husband, to recover back from Margaret Smith the 20*l.*, and to restrain Lady Plomer's action in the meantime. It was held, that as the defendant, Margaret Smith, lived apart from her husband, and had so done for many years, and would not answer the plaintiff's bill, the Court would not charge the husband with the 20*l.*, in regard to their living apart, but that the said Margaret Smith ought to answer the same. And an injunction was accordingly granted against Lady Plomer to restrain her proceeding with the action, until the plaintiff should recover the 20*l.* from Margaret Smith, and in the meantime the plaintiff was ordered to prosecute Margaret Smith with process of contempt for her answer. And so where a man's wife lives separate from him and is not under his influence or control, the Court will upon motion, accompanied by an affidavit verifying the circumstances, give the husband leave to put in a separate answer. (*t*) Upon the same principle, process of contempt will be stayed against a husband for want of his wife's answer, on his making an affidavit that she has left him and that he has no power over her. (*u*)

In a more recent case, (*x*) where a man and his wife were made defendants, the husband put in a separate answer, in which he stated that his wife did not live with him, and that he had no influence over her, but the wife having put in no answer an attachment was sued out against the husband for want of his wife's answer, upon which he was taken into custody. Upon a motion being made on behalf of the husband to discharge the attachment, the Vice Chancellor (Sir J. Leach) discharged it, and ordered the wife to answer separately and to indemnify the husband in respect of costs; observing, however, that he doubted whether notice of the application ought not to have been given to the wife, and that he also doubted whether the husband could answer separately before there [*209] was an order that the wife should put in *a separate answer. His Honor also observed, that although the practice seemed to be to receive the separate answer of the husband, yet that if it were not a case in which an order might be obtained for the wife to answer separately, she must answer jointly, and then his answer must be taken off the file in order that she might join in it. With reference to the practice stated to exist of receiving the answer of the husband, it is to be observed, that in a case where a wife, acting in combination, refused to swear to a plea prepared by her husband for himself and her, and the husband put in the plea, and then applied that it should stand for himself, and that the plaintiff should proceed against his wife, it was so ordered; (*y*) and that in a later case in which a husband having put in a separate answer, moved that he might be at liberty to answer separately from his wife, and that he might not be liable to process on account of his wife not putting in an answer, on an affidavit made by him that his wife lived separate and apart from him, and that he had no control or influence over her; the Vice Chancellor (Sir J. Leach) held, that as he had already put in a separate answer, there was no necessity for that part of the motion which related to the answer, but made the order as to the latter part. (*z*) It is to be noticed, however, that under ordinary circumstances, a husband cannot answer separately from his wife without the sanction of an order for that purpose, and that if he does so, his answer will be treated as a nullity, so that if he has been taken into

(*t*) Chambers v. Bull, 1 Anst. 269.
(*u*) Leithly v. Taylor, 1 Dick. 373; Lloyd v. Basnet, 1 Dick. 143.
(*x*) Garey v. Whittingham, 1 S. & S. 163.
(*y*) Pain v. ——, 1 C. C. 296; Pavie v. A'Court, 1 Dick. 13, *semble* S. C.
(*z*) Barry v. Cane, 3 Mad. 472.

custody for contempt in not putting in the joint answer of himself and wife, the bill may be taken *pro confesso* against him, under the 11 Geo. 4, and 1 Will. 4, c. 36, Rule 2. (*a*)

If a wife appears and afterwards absconds, process will be stayed against the husband, and liberty given to sue out a sequestration against the wife; (*b*) and so if a wife has left her husband, process against him for want of her answer will be stayed, upon his making an affidavit of the fact, and that he *has no power over her. (*c*) If a married woman obstinately [*210] refuses to join in a defence with her husband, the husband may in like manner be allowed to defend himself, and the plaintiff must proceed separately against the wife; (*d*) but it is to be observed, that if a wife cannot, in conscience, consent to such an answer as is drawn up by her husband, she is not obliged to submit to it, but upon application to the Court, she may be considered as a separate person, and will be allowed to answer distinctly and independently of her husband; and that if a husband insists that his wife shall put in an answer contrary to what she believes to be the fact, and by menaces prevail upon her to do it, this is an abuse of the process of the Court, and he may be punished for the contempt. (*e*)

The cases in which a woman usually obtains an order to answer separately from her husband, are those in which she claims an adverse interest, (*f*) or where she lives separate from her husband, or disapproves of the defence he intends to make.

Where a woman, who was made a defendant to a bill filed for the purpose of establishing a will against her, with a man who pretended that he was her husband, but which the woman denied, on her making application to answer separately, Lord Hardwicke ordered, that she should be at liberty to put in a separate answer, but without prejudice to any question as to the validity of the marriage. (*g*)

In general the separate answer of a *feme covert* ought to have an order to warrant it, and if put in without an order, it may be taken off the file; (*h*) but if a husband brings a bill against his wife, he admits her to be a *feme sole*, and she must put in her answer as such, and no order is necessary to warrant her so doing; (*i*) and if she does not put in her answer, the husband may obtain an order to compel her to do so. (*k*)

But although, strictly speaking, the answer of a *feme covert*, if separate, ought to be warranted by an order, yet if her answer *be put in [*211] without such an order, and the same be a fair and honest answer, and deliberately put in with the consent of the husband, and the plaintiff accepts of it and replies to it, the Court will not, on the motion of the wife, or of her executors, set it aside. In the *Duke of Chandos* v. *Talbot*, (*l*) in which this point was determined, a reference had been made to the Master, to state whether her answer had been regularly put in or not.

A married woman, obtaining an order to answer separately from her husband, renders herself liable to process of contempt in case she does not put in her answer pursuant to the order. (*m*) It is to be observed, however, that a *feme covert*, after obtaining an order to answer separately, is entitled to the usual

(*a*) Bitton v. Bennett, 4 Young, 17.
(*b*) Samson v. Overton, 1 Dick. 133.
(*c*) Lloyd v. Basnet, 1 Dick. 143.
(*d*) Pain v. ———, 1 C. C. 296; Marriett v. Lyon, Bunb. 17; Paive v. A'Court, 1 Dick. 13.
(*e*) *Ex parte* Halsam, 2 Atk. 50.
(*f*) Anon. 2 Eq. Ca. Ab. 66.
(*g*) Wyburn v. Blount, 1 Dick. 155.
(*h*) Prac. Reg. 53.
(*i*) *Ex parte* Strangeways, 3 Atk. 478.
(*k*) Ainslie v. Medlicott. 13 Ves. 266.
(*l*) 2 P. Wms. 371.
(*m*) Powell v. Prentice, Ridgw. P. C. 258.

time to put in her answer from the date of the order, and that she will not be bound by any previous order obtained by the husband either on her or his behalf. (*n*)

Where *baron* and *feme* are defendants to a bill, it is necessary that the wife, as well as the husband, should put in a full answer: (*o*) she will not, however, be compelled to answer to anything which may expose her to a forfeiture; (*p*) neither is she compellable to discover whether she has a separate estate, unless the bill is so framed as to warrant the Court in making a decree against such separate estate. Thus, where a bill was filed against a man and his wife for the purpose of enforcing the specific performance of an agreement, alleged to have been entered into by an agent on their behalf for the purchase of an estate from the plaintiff; and in support of the plaintiff's case, it was alleged that the wife had separate moneys and property of her own, and had joined with her husband in authorizing the agent to enter into the agreement, but the bill prayed merely that the husband and wife might be decreed specifically to perform the agreement, and did not seek any specific relief against her separate estate: the wife, having obtained an order to that effect, put in a separate demurrer as [*212] *to so much of the bill as required from her a discovery whether she had not separate money and property of her own, &c., and answered the rest. Upon argument, the Master of the Rolls allowed the demurrer, on the ground that as the decree in cases where a *feme covert* was held liable had been uniformly against the separate estate, and not against the *feme covert* herself; and that as the bill did not seek any decree against any trustees, or particular fund, but only against the wife, it could not be supported, and the interrogatory, if answered, would consequently be of no use. (*q*)

A wife cannot be compelled to make a discovery which may expose her husband to a charge of felony; and if called upon to do so, she may demur. (*r*) The answer of a wife cannot be made use of as evidence to charge her husband, and therefore, where a bill was exhibited, before the statute of frauds, against a husband and his wife to discover a trust, in a matter in which she was concerned as executrix, and they disagreed in their defence, and put in separate answers, the husband denying and the wife admitting the trust; at the hearing, the plaintiff having proved the trust by one witness only, insisted on the wife's confession in her answer; the bill was dismissed, because it was held that the answer of the wife could not bind the husband. (*s*)

For the same reason, a married woman cannot be made a party to a suit for the mere purpose of obtaining a discovery from her to be made use of against her husband, therefore in *Le Texier* v. *The Margrave of Anspach*, (*t*) where a bill was filed against the Margrave to recover a balance due to the plaintiff upon certain contracts, to which bill the Margravine was made a party, as the agent of her husband, for the purpose of eliciting from her a discovery of certain vouchers, which were alleged to be in her possession; a demurrer by the Margravine was allowed by Lord Lougborough, C., and afterwards, upon rehearing by Lord Eldon, who said, "that attending to the circumstance that no relief was prayed against the wife, without saying what would be the effect, [*213] *if there had been a prayer that the vouchers should be delivered up by her; but, observing that she was made a party merely for discovery, which is of no use unless she can be made a witness and the discovery can be used as her testimony against her husband, and a great principle of public policy forbidding that she should be a witness for that purpose, as the

(*n*) Jackson v. Haworth, 1 S. & S. 161.
(*o*) Wrottesley v. Bendish, 3 P. Wms. 235.
(*p*) Ibid.
(*q*) Francis v. Wigzell, 1 Mad. 258.
(*r*) Cartwright v. Green, 8 Ves. 405.
(*s*) Anon. 2 Cha. Ca. 39.
(*t*) 5 Ves. 322; Le Texier v. The Margravine of Anspach, 15 Ves. 159.

bill prays no relief against her, my opinion is, that she is not a proper party to the bill, as a bill for discovery by her as a witness, a character which she cannot sustain against her husband." Upon the same principle, where a bill was filed against a man and his wife for a discovery in aid of an action at law brought against him to recover a debt due from the wife *dum sola*, a separate demurrer put in by the wife was allowed. (*u*)

In *Rutter* v. *Baldwin* (*w*) the Court agreed clearly, that a wife can never be admitted to answer, or otherwise as evidence, to charge her husband; and that where a man marries a widow executrix, &c., her evidence shall not be allowed to charge her second husband, (*x*) but in that case the wife having held herself out as *feme sole*, and treated with the plaintiff and other parties to the cause, who were ignorant of her marriage, in that character, and it having been proved in the cause that on some occasions the husband had given in to the concealment of the marriage; the Court allowed the answer of the wife to be read as evidence against the husband, and decreed accordingly.

But though the separate answer of a married woman cannot be read as evidence against her husband, yet it may be read against herself notwithstanding her coverture. Thus a *feme covert*, being the heir at law of a testator, and living separate, and answering separately from her husband, in pursuance of an order for that purpose, her admission of the will was held sufficient ground to establish it. (*y*) This appears to have been the case in *Le Neve* v. *Le Neve*. (*z*) In that case, the object of the suit was to set aside a settlement, which had been made by the husband upon his second marriage, of property comprised in a settlement made upon his first marriage, under which the plaintiffs claimed; and the answer of the second wife appears to have [*214] been read for the purpose of showing that the attorney who prepared both settlements was the attorney employed by her, so as to fix her with notice, through him, of the existence of the first settlement. The answer, it is to be observed, could not affect the husband, because he had a life interest under both settlements; and the principal question in the cause was, whether the second wife, at the time her settlement was executed, had notice of the first.

Where a *baron* and *feme* are made defendants to a suit, relating to personal property belonging to the *feme*, and they put in a joint answer, such answer may be read against them, for the purpose of fixing them with the admissions contained in it; but where the subject matter relates to the inheritance of the wife, it cannot; (*a*) and the facts relied upon must be proved against them by other evidence: thus, in *Merest* v. *Hodgson*, (*b*) the Lord Chief Baron refused to permit the joint answer of the husband and wife to be read, but ordered the cause to stand over, to give the plaintiffs an opportunity of proving the facts admitted.

From the report of the case in *Eyton* v. *Eyton*, (*c*) it appears, on first view, as if the separate answer of a husband had been admitted by the Master of the Rolls to be read as evidence against the wife in a matter relating to her inheritance, but upon closer attention, it will be found, that in all probability the reason of the decree in that case was, that his Honor conceived that the counterpart of the settlement, which appears to have been produced, was considered to be sufficient evidence of the settlement; at least, this appears to have been

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(*u*) Barron v. Grillard, 3 Ves. & B. 165. (*w*) 1 Eq. Ca. Ab. 227.
(*x*) *Vide* Cole v. Gray, 2 Vern. 79.
(*y*) Codrington v. Earl of Shelburne, 2 Dick. 475.
(*z*) 3 Atk. 648. (*a*) Evans v. Cogan, 2 P. Wms. 449.
(*b*) 9 Price, 563. *Vide etiam* Elston v. Wood, 2 M. & K. 678.
(*c*) Prec. in Ch. 116.

the ground upon which the case was decided on the appeal before the Lord Keeper (Wright.)

In *Ward* v. *Meath*, (*d*) a bill was exhibited against the husband and wife, concerning the wife's inheritance; the husband stood out all the processes of contempt, and upon its being moved that the bill might be taken *pro confesso*, it was opposed, because *the wife having in the *interim* obtained [*215] an order to that effect, put in an answer, in which she set forth a title to herself; and the Court decreed that the bill should be taken *pro confesso* against the husband only, and that he should account for all the profits of the land which he had received since the coverture, and the profits which should be received during coverture.

It appears, from the report of the above case to have been admitted, that where the husband does not answer, the answer of a wife, in a case relating to her inheritance, is no answer; and that if the husband will not appear, no decree can be had against a *feme covert* for her inheritance. Some doubt, however, appears to be thrown upon the authority of *Ward* v. *Meath*, by the report of *Gibson* v. *Scevington*, (*e*) in which the Lord Keeper seems to have refused to allow a bill to be taken *pro confesso* against a husband, where his wife had appeared and answered; but from a perusal of the report, it appears that the Lord Keeper's decision did not apply to the question of taking the bill *pro confesso* against the husband, but only to the question whether a decree could be made against the husband upon the answer of his wife, put in without his privity, which his Lordship expressed his intention to decide in the negative; saying that they must proceed against the husband, and levy on the sequestration to bring him in.

It may be observed in this place, that there is no case in which this Court has made a personal decree against a *feme covert* alone. She may pledge her separate property, and make it answerable for her engagements; but where her trustees are not made parties to a bill, and no particular fund is sought to be charged, but only a personal decree is prayed for against her, the bill cannot be sustained. (*f*) Upon this ground, in the case before referred to, where a bill was filed against a husband and wife for the specific performance of an agreement for the purchase of an estate, charging that the wife had separate property sufficient to answer the purchase money, but without praying any specific relief against such separate estate, a demurrer put in by the wife to so much of the bill as sought a discovery from her whether she had *a separate [*216] estate or not, was allowed. (*h*) Upon the same principle, Lord Hardwicke held that a wife cannot be taken in execution for costs. (*i*) And so it has been determined, that a bill will not lie for the specific performance of a covenant by the husband that his wife shall levy a fine, because upon such a decree the husband could not compel his wife to levy the fine; and, if she would not comply, imprisonment would fall upon the husband for the contempt. (*j*)

If, however, the equity of redemption of a mortgaged estate comes to a married woman, and a bill is brought against her and her husband to foreclose it, upon which a decree for foreclosure is pronounced, the wife is absolutely foreclosed, and will not be allowed time to show cause against the foreclosure after her husband's death; (*k*) and, where a widow filed a bill to set aside a

(*d*) 2 Cha. Ca. 173; 1 Eq. Ca. Ab. 65. (*e*) 1 Vern. 247.
(*f*) Hulme v. Tenant, 1 Bro. C. C. 16; Francis v. Wigzell, 1 Mad. 258–263.
(*h*) Francis v. Wigzell, *ubi supra*. (*i*) Jones v. Champion, 1 Dick. 160.
(*j*) Ortread v. Round, Vin. Ab. tit. Baron & Feme, (H. 6.) Ca. 4; 1 Eq. Ca. Ab. 145, pl. 4, S. C.
(*k*) Mallack v. Galton, 3 P. Wms. 352.

decree of foreclosure pronounced against her and her husband during coverture, and to be let in to redeem, and the mortgagee pleaded the proceedings and decree in the former cause, the plea was allowed. (*l*)

Where an estate has been sold under a decree of the Court, a *feme covert* is as much bound by the decree as a *feme sole*, although it may be to her prejudice; as it would most ruinously depreciate the value of property sold under a decree in equity, if, where there is neither fraud or collusion in the purchaser, his title could be defeated. It is to be observed, however, that a decree obtained by fraud is invalid. (*m*)

The name of the wife is usually joined with that of the husband in the same *subpœna;* and as the husband and wife are accounted but one person, (*n*) the *subpœna* may include two other names besides, in order to complete the three names which, according to the last new orders, may be inserted in the same writ. (*o*)

Where husband and wife are defendants, service of the **subpœna* on the husband is good service on him as well as his wife; and [*217] service on the wife is good service on the husband, if the body of the *subpœna*, under seal, is left with her at her husband's dwelling-house or place of residence. (*p*)

If the husband and wife are served with a *subpœna*, the husband must enter an appearance for both by his clerk in Court, or an attachment will issue against both. (*q*) And if the husband only be served, and has notice that his wife is also a defendant, he must enter an appearance for her, otherwise an attachment will issue against him, even though he appear and answer the bill. (*r*) And if an appearance is entered for the wife, and she does not answer, an attachment will issue against both. (*s*)

If the bill be brought against *baron* and *feme* for a demand out of the separate estate of the wife, and the husband is abroad, and not amenable to the process of the Court, the *subpœna* may be served upon the wife alone, and she must appear and answer the bill. (*t*)

We have seen before that where a man's wife refuses to join with him in his defence, or lives separate from him, and is not under his influence or control, he may apply to the Court by motion for leave to put in a separate answer from her, which will be granted, and in the meantime process will be stayed against him. And it seems that where he has actually answered without such an application having been previously made, he may in like manner apply by motion to the Court to have the process of contempt against him stayed. (*u*)

But it is to be observed, that in all cases after due service, process of contempt may be awarded against the husband for the default of the wife, unless an order be obtained to the contrary. (*x*)

Where a suit has been instituted against a man and his wife, and [*218] the husband dies pending the proceedings, the suit *will not be abated. Thus, where a bill was filed against *baron* and *feme* executrix for a

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(*l*) Ibid.
(*m*) Burke v. Crosbie, 1 Ball. & B. 489; Kennedy v. Daly, 1 Scho. & Lef. 355.
(*n*) Gilb. For. Rom. 40. (*o*) Order, Dec. 1833, V.
(*p*) Pilgrim v. Reed. Cary, 111; 1 Turner & V. 69; Barlow v. Baker, ib. 76.
(*q*) Monox v. Abel, Cary, 92. (*r*) Toth. Proceedings, 11.
(*s*) Ibid.
(*t*) Dubois v. Hole, 2 Vern, 614; Bell v. Hyde, Prec. in Ch. 328, and *ante*.
(*u*) *Ante* 209. (*x*) Prac. Reg. 37; Hind. 94.

legacy, and after the defendants had answered and witnesses had been examined, and publication passed, the husband died; it was insisted that the wife was not bound by the answer, nor by the depositions taken during coverture, but the Court held that there was no abatement, and that the wife was bound by the answer and depositions; though it was held that in the case of the wife's inheritance it might be otherwise. (y)

But although where a bill has been exhibited against a man and his wife, and the husband dies pending the suit, there is no abatement, and the wife will be bound by the former answer and proceedings in the cause; yet where, by the death of the husband, a new interest arises to the wife, it seems that she will not be bound by the former answer, and that a supplemental bill ought to be filed, for the purpose of giving her an opportunity of putting in another defence, in respect of her newly acquired interest. Thus, where a bill was filed by the assignees of a married man to compel the specific performance of a contract for the sale of a part of his estate, to which the wife was made a co-defendant in respect of certain terms of years which were vested in her as administratrix of a person to whom the terms had been assigned to protect the inheritance, and she had joined with her husband in putting in an answer, by which she claimed to be dowable out of the property; upon the death of her husband an objection was taken to the suit being proceeded with till a supplemental bill had been filed against her, in order to give her an opportunity of making another defence in respect of the right of dower which had become vested in her, and the Master of the Rolls (Sir Thomas Plumer) said, that her former answer could not be pressed against her, because, in the former case, she was made a party as administratrix; but the right to dower which she then had was not claimed by her as representative, but in her own character; and it was an interest that had devolved upon her since her answer was put in. (z) [*219] His Honor, therefore, held the suit to be defective. Whereupon a supplemental *bill was filed against the widow, in order to enable her to claim, in her separate character, what she had before claimed in her character of wife. Upon hearing the cause, however, Lord Eldon, although he recognized the principle laid down by Sir Thomas Plumer, said, that he should have been inclined, in that case, to have come to a different decision, as he thought that it would have been difficult for the widow, in her answer to the supplemental bill, to state her case differently from the way in which it had been stated in her former answer. (a)

It follows, from what has been before stated, that where a man and his wife are defendants to a suit, if the wife dies there will be an abatement of the suit. Thus, where a man having married an administratrix, the plaintiff obtained a decree against him and his wife, after which the wife died; it was held the suit was abated, and that the administrator ought to be made a party before any further proceedings could be had in the cause. (b)

SECTION VI.

Idiots and Lunatics.

An idiot or a lunatic may, as we have seen, be made a defendant to a suit, but then he must defend by the committee of his estate; (c) who, as well as the

(y) Shelberry v. Briggs, 2 Vern. 248; 1 Eq. Ca. Ab. 1, pl. 4, S. C.
(z) Mole v. Smith, 1 Jac. & W. 665. (a) Mole v. Smith, Jac. 495.
(b) Jackson v. Rawlins, 2 Vern. 195, Ed. Raithby, n. 1.
(c) Lord Red. 82.

idiot or lunatic whose estate is under his care, is a necessary party to a suit respecting that estate. (*d*)

If a suit be instituted against an idiot or a lunatic, the committee of his estate generally applies by motion or petition to be appointed guardian, to answer and defend the suit, which is ordered of course; the guardianship being rarely, if ever, assigned by commission, as in other cases. (*e*)

In a town cause, the guardian is sworn to his answer at the public office, in like manner as a guardian to an infant. In a country cause the answer is taken by commission; which is in the same form, and executed in the same manner, **mutatis mutandis*, as in the case of an infant answering by [*220] guardian. (*f*)

If it happens that an idiot or a lunatic has no committee, or a committee has an interest opposite to that of the person whose property is entrusted to his care, an order may be obtained for appointing another person as guardian for the purpose of defending a suit against him. (*g*)

In *Howlett* v. *Wilbraham* (*h*) it is stated, that an order to this effect was obtained on motion by the plaintiff; but upon reference to the registrar's book, it appears that the application was made on the part of the defendant, who was not a lunatic, but was alleged to be a person of weak intellect. (*i*) In some cases, however, it may be proper that the application should be made by the plaintiff.

SECTION VII.

Infants.

INFANTS as well as adults may, as we have seen, be made defendants to suits in equity; and, in such cases, it is not necessary that any other person should be joined with them in the bill, nor is it usual for the plaintiff to describe them as infants in his bill, unless any question in the suit turns upon the fact of their infancy.

Although it is not necessary that in bringing a bill against infants the plaintiff, as in the case of married women, should join any other person with them; yet they are not permitted, on account of their supposed want of capacity, to defend themselves; and therefore, where a defendant to a suit is an infant, the Court will appoint a proper person to put in his defence for him, and generally to act on his behalf in the conduct and management of the case.

The person so appointed is called "the guardian of the infant;" and in the books is generally styled "the guardian *ad litem*," to distinguish him from the ordinary guardian.

*The duty of such guardian is to put in the proper defence for the [*221] infant; and it seems that he is responsible for the propriety and conduct of such defence; and if the answer put in by him for the infant should be reported scandalous or impertinent, he would be liable to the costs of it. (*a*) Sometimes the guardian is ordered or decreed to perform a duty on behalf of the infant, his refusal or neglect to do which will subject him to the censure of the Court. (*b*)

(*d*) Lord Red. 4.
(*e*) Hind. 252.
(*f*) Hind. 252.
(*g*) Lord Red. 82.
(*h*) 5 Mad. 423.
(*i*) Reg. Lib. 1820, A. fo. 4, *sub nomine* Howell v. Wilbraham.
(*a*) Hind. 241.
(*b*) Ibid.

If the guardian of an infant defendant, or the next friend of an infant plaintiff, does not do his duty, or other sufficient ground be made out, the court will remove him. (c) It seems, however, that infants are as much bound by the conduct of those who conduct their case, as adults, provided their conduct be *bonâ fide*. Thus although, strictly speaking, where infants are concerned, the evidence in the Master's office must be taken upon interrogatories and not upon affidavit, yet it seems that if the solicitor for the infant assents to, or acquiesces in that method of proceeding, the infant will be thereby bound. (d) In like manner, although an heir-at-law is entitled, as of course, to an issue *devisavit vel non*, yet it seems that such issue may be waived on the part of the infant. (e) And so, although the Court will not, where infants are concerned, make a decree by consent without first referring it to the Master to inquire whether it is for their benefit, yet when once a decree has been pronounced without that previous step, it is considered as of the same authority as if it had been referred to the Master, and he had made a report thereupon that it would be for their benefit; (f) in the same manner, an order for maintenance, though usually made upon reference to a Master, if made without would be equally binding. (g)

An infant defendant is as much bound by a decree in equity as a person of full age; therefore, if there be an absolute decree made against a defendant who is under age, he will not be permitted to dispute it unless upon the same [*222] *grounds as an adult might have disputed it; such as fraud, collusion or error.

To impeach a decree on the ground of fraud or collusion, he may proceed either by a bill of review, or supplemental bill in the nature of a bill of review; or he may so proceed by original bill. He may also impeach a decree, on the ground of *error*, by original bill; and he is not obliged, for that purpose, to wait till he has attained twenty-one. (h)

Among the errors that may be assigned for the purpose of impeaching a decree against an infant, is the circumstance that in a suit for the administration of assets against an infant heir, a sale of the real estate has been decreed before a sufficient account has been taken of the personal estate. (i) And so, if an account were to be directed against an infant in respect of his receipts and payments during his minority, such a direction would be erroneous. (k)

Another ground of error for which a decree against an infant may be impeached is, that it does not give the infant a day after his coming of age to show cause against it in cases where he is entitled to such indulgence. (l)

This arises from the practice which was formerly adopted in Courts of Equity, from analogy to the rule of law, by which, when an infant was sued on the specialty of his ancestor, he might plead that he was an infant, and that he ought not to answer until he was of age, upon which the *parol* demurred; that is, all further proceeding was stayed till the infant attained twenty-one. (m) In imitation of this rule, Courts of Equity held, that in case of lands in fee descending upon an infant, the parol should demur in equity as well as at law, (n) and that whether the estate was equitable or legal. (o)

From analogy to this rule, by which the parol was made to demur wherever the real estates of an infant were sought to be subjected to the debt of his

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(c) Russell v. Sharpe, 1 J. & W. 482.
(d) Tillotson v. Hargrave, 3 Mad. 494.
(e) Levy v. Levy, 3 Mad. 245.
(f) Wall v. Bushby, 1 Bro. C. C. 484.
(g) Ibid.
(h) Richmond v. Tayleur, 1 P. Wms. 734.
(i) Bennett v. Hamill, 2 Sch. & Lef. 566.
(k) Hindmarsh v. Southgate, 3 Russ. 324.
(l) Bennett v. Hamill, 2 Sch. & Lef. 566.
(m) Com. Dig. Enfant, [D.] 3; ib. Plead. 2, [E.] 3.
(n) Chaplin v. Chaplin, 3 P. Wms. 364.
(o) Lechmere v. Brasier, 2 Jac. & W. 287; Smith v. Cotton, Ca. temp. Talb. 198.

ancestor, the Courts of *Equity adopted another rule, by which it was rendered necessary, that in all cases in which the real estates [*223] of an infant were to be sold or conveyed under a decree of the Court, and it was requisite, in order to complete the title to such estate, that the conveyance should be executed by the infant, the execution of such conveyance should be deferred till after the infant should have had an opportunity, after attaining twenty-one, to show cause against the decree. For this purpose a provision was inserted in the decree, giving the infant a day to show cause against it within a certain time after he came of age. The words of the decree in such cases were as follows: "And this decree is to be binding on the infant, unless being served with process for that purpose, he shall, within six months after he shall have attained his age of twenty-one years, show unto this Court good cause to the contrary." The omission of this clause in a decree for a conveyance by an infant of his estate, was so strictly insisted upon in all cases, that the omission of it has been considered as an error in the decree. (*p*)

By the Stat. 1 Will. 4, c. 47, however, both the rule for the parol demurring, and the clause giving an infant a day after coming of age, to show cause against a decree, requiring him to convey his inheritance to a purchaser, have been taken away in all cases where the object of the suit is to enforce the payment of the debts of a person deceased under whom the infant claims.

By the 10th sect. of that statute, it is enacted, that from and after the passing of the Act, where any action, suit or other proceeding for the payment of debts, or any other purpose, shall be commenced or prosecuted by or against any infant under the age of twenty-one years, either alone or together with any other person or persons, the parol shall not demur; but such action, suit or other proceeding shall be prosecuted and carried on in the same manner and as effectually as any action or suit could before the passing of the Act be carried on or prosecuted against any infants, where, according to law, the parol did not demur.

*By another section of the same Act, (*q*) it is enacted, that where any suit hath been or shall be instituted in a Court of [*224] Equity for the payment of any debts of any person or persons deceased, to which his or their heir or heirs, devisee or devisees may be subject or liable, and such Court of Equity shall decree the estates liable to such debts or any of them, to be sold for satisfaction of such debt or debts, and by reason of the infancy of such heir or heirs, devisee or devisees, an immediate conveyance thereof could not, as the law then stood, be compelled; in every such case, such Court shall direct, and if necessary, compel such infant or infants to convey such estates so to be sold, by all proper assurances in the law to the purchaser or purchasers thereof, and in such manner as the said Court shall think proper and direct, and every such infant shall make such conveyance accordingly; and every such conveyance shall be as valid and effectual to all intents and purposes as if such person or persons, being an infant or infants, was or were at the time of executing the same, of the full age of twenty-one years.

In consequence of the last section, the law now is, that wherever an estate vested in an infant is ordered to be sold for the payment of the debts of the person through whom he claims either as heir or devisee, a conveyance of such estate to a purchaser may be immediately made by the infant, under the sanction of the Court. And it has been decided, that the Act applies to cases where, in a creditor's suit, the decree for the sale of estates for the payment of debts, had been made prior to the passing of the Act. (*r*) It has also been held, that under the 11th section, the heir of a devisee may be compelled to join in the conveyance to a purchaser, although the words of the Act refer only to the

(*p*) Richmond v. Taylour, 1 P. Wms. 734.
(*q*) Sec. 11.
(*r*) Chapman v. Tennant, 2 Russ. & M. 74.

heir or heirs, devisee or devisees, of the person or persons deceased, whose debts are to be satisfied. (*s*)

It is to be observed, that the 11th section of the Act extends only to cases where estates are ordered to be sold for *the satisfaction of any debts of any person or persons deceased, the old practice of the Court, therefore, remains unaltered in all other cases; consequently, wherever a conveyance is required from an infant, for any other purpose than the payment of debts, the clause giving the infant a day to show cause must still be inserted. Thus, in cases of partition, where mutual conveyances are to be executed, and any of the conveying parties are infants, the conveyances cannot be executed by the infants till twenty-one; (*t*) and a day will be given to them after attaining that age, (*u*) to show cause against the decree. It seems that, formerly, where decrees were made for partition, and some of the parties were infants, and others adult, the practice was to direct mutual conveyances to be executed by the adult parties, and by the infants at twenty-one, unless they should show cause to the contrary; (*x*) now, however, the practice appears to be not to direct a conveyance by any of the parties till all the infants shall have attained twenty-one, and have had an opportunity of showing cause against the decree; in the meantime the decree only extends to make the partition, give possession, and order enjoyment accordingly, till effectual conveyances can be made. (*y*)

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In *Eyre* v. *The Countess of Shaftesbury*, (*z*) it is said, that in all decrees against infants, even in the plainest cases, a day must be given them to show cause when they come of age. Lord Hardwicke, however, in *Sheffield* v. *The Dutchess of Buckingham*, (*a*) said, that he took it to be the course of the Court not to give a day unless a conveyance was directed, either in *form* or *substance*; and this, upon reference to the cases referred to in the note appears to be the most correct statement of the practice. (*b*) As a further confirmation of the *rule as laid down by Lord Hardwicke, it may be observed, that where a bill is filed for the purpose of establishing a will of real estate against an infant heir at law, no day is ever given in the decree for the infant to show cause against it; and also, that in cases where the legal estate is in trustees, and an execution of the trust is declared, it has been held that there is no occasion to give a day to show cause to an infant *cestui que trust*. (*c*)

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There is one case, nevertheless, in which the rule as laid down by Lord Hardwicke is subject to exception, namely, that of foreclosure against an infant; (*d*) in that case, although no conveyance is required from the infant, either

(*s*) Brook v. Smith, 2 Russ. & M. 73.

(*t*) Tuckfield v. Buller, 1 Dick. 241; Amb. 197, S. C.; Seton, 296, n.

(*u*) Hubble v. Read, 1 Dick. 243, n. (*x*) Tuckfield v. Buller, 1 Dick. 242.

(*y*) *Vide* the decree in Agar v. Fairfax, 17 Ves. 545, 554, and Attorney General v. Hamilton, 1 Mad. 214; as to the practice where the infant is plaintiff, *vide supra*.

(*z*) 2 P. Wms. 102. (*a*) 1 West. 684.

(*b*) Thus where in a suit instituted previously to the 1 Will. 4, c. 47, lands had been devised to trustees to be sold for payment of debts, and the heir at law was an infant, no day was given him to show cause, because the land being devised to trustees, nothing descended to the infant, so that there was no necessity for him to join in the conveyance. (Cook v. Parsons, Prec. Ch. 184; 1 Eq. Ca. Ab. 289, a. 4; 2 Vern. 429.) But in another case there was a devise of all the testator's real and personal estate for the payment of his debts, and an appointment of executors, but no specific devise of the real estate was named, Lord Hardwicke directed the infant heir to convey at 21, unless, &c. (Blatch v. Wilder, 1 Atk. 421; *vide etiam* Uvedale v. Uvedale, 3 Atk. 119.)

(*c*) Thorston v. Blackburn, 2 Keb. 7; 1 Harrison, Ch. Prac. Ed. Newl. 367, n.

(*d*) Booth v. Rich, 1 Vern. 295; Williamson v. Gordon, 19 Ves. 114; Anon. Mos. 66; Bennett v. Edwards, 2 Vern. 392.

in form or substance, he will be allowed six months after he comes of age to show cause against the decree. (*e*)

It is to be observed, however, that in such a case the only cause which can be shown by the defendant is error in the decree: and it has been held that he may not unravel the account, nor is he so much as entitled to redeem the mortgage by paying what is due, (*f*)

The clause giving the infant a day to show cause against a decree of foreclosure after attaining twenty-one, must be inserted in the order for making the decree absolute, as well as in the original decree; and in *Williamson* v. *Gordon*, (*g*) an order was made upon motion for varying a decree in which the clause had been omitted, by its insertion.

Where a mortgage in fee had been executed, with the usual covenants for title by the mortgagor, but it afterwards appeared that the mortgaged premises were in fact copyhold *land, which never having been surrendered to the mortgagee, descended upon the death of the mortgagor to an [*227] infant heir, the Master of the Rolls, (Lord Alvanley) although he was clearly of opinion that the covenant in the mortgage deed was a contract for a valuable consideration affecting the heir, would not make a decree directing the heir to surrender the estate, and in default of payment to be foreclosed; but said, that the mortgagor must get the legal estate conveyed to him before he would direct a foreclosure. His Honor, however, afterwards made a decree, declaring that the covenant bound the land, and directed an account of what was due to the plaintiff for principal, interest and costs, upon payment of which within six months after the Master should have made his report, the plaintiff was to reconvey the mortgaged premises to the defendant, &c.; but in default of such payment, the plaintiff was to be let into possession of the mortgaged premises, and to enjoy the same till the defendant attained twenty-one years, upon doing which the defendant was directed to surrender the mortgaged premises to the plaintiff; and it was declared that the decree should be binding, unless upon being served with a *subpœna* to show cause, he should within six months after attaining twenty-one show cause to the contrary. (*h*)

It was said by the Court in *Booth* v. *Rich*, (*i*) that where there is an infant defendant to a bill of foreclosure, the proper way is to decree the lands to be sold to pay the debt, and that such a sale would bind the infant: but in *Goodier* v. *Ashton*, (*k*) Sir W. Grant said, that the modern practice was to foreclose infants, and refused to refer it to the Master to inquire whether a sale would be for the benefit of the infant. In a subsequent case, however, Lord Eldon said, (*l*) it would be too much to let an infant be foreclosed, when if the mortgagee would consent to a sale, a surplus might be got of perhaps 4,000*l.*, considered as real estate for the benefit of the infant. His Lordship accordingly made a decree, by which it was referred to the Master to inquire and report whether it *would be for the benefit of the infant that the [*228] estate should be sold. In that case the reference was to be made only in case the mortgagee consented, and the same appears to have been the order in *Pace* v. *Marsden*; (*m*) but in *Wakeham* v. *Lome*, and *Hamond* v. *Bradley*, (*n*) like decrees appear to have been made without its being stated

(*e*) Mallack v. Galton, 3 P. Wms. 352.

(*f*) Mallack v. Galton, 3 P. Wms. 352; Lyne v. Willis, ib. n. B. This, however, must not be understood as applying to cases where the decree has been obtained by fraud, or where the infant claims by a title paramount to the mortgage. *Vide post*, 243.

(*g*) Williamson v. Gordon, 19 Ves. 114.

(*h*) Spencer v. Boyes, 4 Ves. 370.

(*i*) 1 Vern. 295.

(*k*) 18 Ves. 84.

(*l*) Mondey v. Mondey, 1 V. & B. 223.

(*m*) Seton on Decrees, 275.

(*n*) Ibid.

that they were made by consent, or even that a sale was prayed. It is to be observed also, that in those cases, as well as in *Pace* v. *Marsden*, the decree was made for a sale without a previous reference to the Master to inquire whether it would be for the benefit of the infant. In *Pace* v. *Marsden*, however, it seems that a sale was prayed by the bill.

Where an estate is directed to be sold, and a day is given to an infant to show cause after he attains twenty one, a direction is generally given in the decree, that in the meantime a purchaser under it shall hold and enjoy the estate against such infant until he attains such age; and it seems that a purchaser buying the estate under such a decree must accept the order of the Court for a future conveyance as a sufficient security. (*o*) In such a case the purchaser must presume that the Court has taken the necessary steps to investigate the right of the parties, and that on such investigation it has properly decreed a sale; (*p*) and the Court so far protects a purchaser under a decree, that it will not permit his title to be affected by a mere error in the decree. Thus in *Bennett* v. *Hamill*, (*q*) where a bill was filed by an infant defendant on attaining twenty-one, against the heir of a purchaser under a decree, and other parties interested in the estate, to impeach the decree as erroneous, and to recover the estate, the principal question was, whether a sale under a decree of the Court was to be impeached on the grounds; 1st, That the heir of the debtor not being of age and being required to join in the conveyance, had not a day to show cause. 2dly, That there was no sufficient account of the personal estate; and Lord Redesdale dismissed the bill as against the representatives of the purchaser, although he [*229] allowed the suit to proceed against *the other parties. In delivering his judgment his Lordship observed, that after considering the subject a good deal, he thought it would be too much to say that a purchaser under a decree of that description could be bound to look into all these circumstances; that, if he was, he must go through all the proceedings from the beginning to the end, and have the opinion of the Court that the decree is right in all its parts, and that it would be impossible to alter it in any respect; that the cases warranted no such opinion; and that, on the contrary, as far as he could find, the general impression they give is, that a purchaser has a right to presume that the Court has taken the steps necessary to investigate the rights of the parties, and that it has on that investigation properly decreed a sale. Then he is to see that this is a decree binding the parties claiming the estate; that is, to see that all proper parties to be bound are before the Court; and he has further to see, that taking the conveyance he takes a title that cannot be impeached *aliunde*. He has no right to call upon the Court to protect him from a title not in issue in the cause, and in no way affected by the decree; but if he gets a proper conveyance of the estate, so that no person whom the decree affects can invalidate his title, although the decree may be erroneous, and therefore to be reversed, the title of the purchaser ought not to be invalidated for insufficiency. (*r*)

Infant defendants are served with *subpœnas ad respondendum* in the same manner as adults; (*s*) where, however, they cannot be found so as to be served, service of the *subpœna* upon the guardian is sufficient. Thus service upon the mother of an infant was held good service, as she is the natural guardian of her children; (*t*) and in *Thompson* v. *Jones*, (*u*) service upon the father-in-law of an infant was permitted. It seems, however, that previously to such service,

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(*o*) Powell v. Powell. Mad. & Geld. 53. (*p*) Bennett v. Hamill, 2 Sch. & Lef. 566.
(*q*) *Ubi supra.* (*r*) *Vide* Lloyd v. Johnes, 9 Ves. 37.
(*s*) Where there is an infant defendant the *subpœna* to hear judgment must be served upon the guardian, *ad litem*, and not upon the defendant.
(*t*) Smith v. Marshall, 2 Atk. 70. (*u*) 8 Ves. 141.

an order to authorize it should previously be obtained upon motion, (x) and where, after such order, and service in pursuance thereof, *the infants did not appear, it was, on motion, ordered that the plaintiff should be at liberty to sue out an attachment against them to compel them to appear. (y) [*230]

If an infant, being served with a *subpœna* will not appear, on affidavit of service of the *subpœna* an attachment issues against him; this however is in fact never executed, but counsel moves upon the attachment for an order for a messenger to bring the infant into Court, and when he is there the Court always assigns him a guardian. (z)

So if an infant appears to a bill and refuses to answer, an attachment issues against him for not answering, (which is never in fact executed) and counsel moves the Court upon the attachment for a messenger to bring the infant into Court, and the Court will make such order accordingly. (a)

Where an infant defendant is brought into Court by the messenger, and no one offers on his behalf to be his guardian, the Court usually orders the senior six clerk, who is not engaged in the cause, to be assigned his guardian, to appear, answer or defend the suit. (b) In general, however, some relation or friend of the infant prays to be appointed guardian for him, to answer and defend the suit, which the Court orders. (c)

It has been decided that an infant cannot be kept in custody after a guardian has been assigned him, and that he pays no costs of contempt, but the plaintiff always pays the messenger. (d)

An infant, upon being served with a *subpœna* to answer, must, if in town, appear in Court and have a guardian assigned to him, by whom he must defend the suit. If in the country he must sue out a commission to assign a guardian and put in his answer, and whether he pleads, answers or *demurs, still it must be done by his guardian; for if it be a plea, answer or demurrer of an infant without his guardian, it will be irregular. (e) Where an infant is too ill to appear in Court to have a guardian assigned, a commission will be ordered. (f) [*231]

The guardian is usually the nearest relation of the infant, not claiming an interest opposite to that of the infant in the subject-matter of the suit.

When a guardian for an infant is to be appointed in Court, (which he may be, on any day after appearance, either in term or vacation, by the Lord Chancellor or Vice Chancellor, or by the Master of the Rolls,) the infant and the party intended to be appointed guardian must personally attend in Court, and then the clerk in court for the infant prepares a note in writing, containing the title of the cause and praying that C. D. (naming the person) may be appointed guardian to A. B., the infant, by whom he may answer and defend the suit. This note the clerk in court delivers to and leaves with the registrar, who takes an opportunity of mentioning it to the Court, and then if the person offering himself as guardian appears upon examination to be a proper person, the appointment is made of course. The registrar who attended on the day on which the appointment was made, will, upon application, draw up and pass the order,

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(x) Garnum v. Marshal, 1 Dick. 77. (y) Baker v. Holmes, 1 Dick. 18.

(z) Prac. Reg. 223. Lord Chief Baron Gilbert, in his *Forum Romanum*, (p. 205,) says, that it is doubted whether this can be done against a peer of the realm, who is an infant, and whose person is sacred; but in an *anonymous* case which occurred in the 36 Car. 2, (2 Cha. Ca. 163,) it appears that a sequestration, for want of appearance, was issued against Lord Mohun, who was an infant peer of seven years old.

(a) Prac. Reg. 223. (b) Ibid.

(c) Ibid. 224. (d) Perkins v. Hamond, 1 Dick. 287.

(e) Gilb. For. Rom. 205.

(f) Duke of Marlborough v. Duchess of Marlborough, 1 Dick. 71.

which is to be entered and served upon the adverse clerk in court like other orders of course. (*g*)

Where in consequence of the infant's residence in the country it is necessary that a commission should issue for the appointment of a guardian, application should be made to the Court, either by motion or petition, for an order for such commission. This order is made *ex parte*, as a matter of course, and must be drawn up, passed and entered like other orders of course. The original order must then be left with the defendant's clerk in court, with the names of the commissioners intended to be inserted in the commission. (*h*) The commission [*232] is then made out by *the clerk in court *ex parte*, and when sealed is sent by him to the solicitor, who acquaints the commissioners with the nature of the commission and settles with them the time and place of executing it.

When the commission is executed, it is necessary that two of the commissioners should attend at the time and place appointed to open it, and then the infant being personally produced before them, and the person proposed as guardian appearing upon inquiry to be a proper person, the commissioners appoint such person to be guardian to the infant to answer and defend the suit on his behalf. Although the personal attendance of the infant before the commissioners is necessary, that of the guardian to be appointed may be and generally is dispensed with. (*k*)

When the commissioners have appointed the guardian, a certificate of such appointment must be engrossed upon parchment and annexed to the commission. (*l*) When the certificate has been annexed to the commission, the following return is endorsed upon the commission, and subscribed by the commissioners: "*The execution of this commission appears in a certain schedule hereto annexed.*"

The commission, with the certificate annexed, is then to be sent to the defendant's clerk in court, at the Six Clerk's Office, and thereupon the appointment of guardian is complete. (*m*)

When the guardian has been appointed, whether in Court or by Commission, it is his duty to put in a defence on the part of the defendant, and any such defence without such guardian will be irregular, for the guardian is liable to the costs if the defence be improper, or if the answer be scandalous or impertinent. (*n*)

If the defence of the infant is by answer or plea requiring to be substantiated upon oath, the plea or answer must be put in upon the oath of the guardian, unless an order has been obtained to take it without oath, which is frequently done by consent, upon motion or petition. (*o*)

[*233] *Where the plea or answer is to be taken without oath, the order for that purpose must be drawn up, passed, and entered, and left with the defendant's clerk in court, (for without such order the plea or answer cannot be filed,) the record is then inscribed,

"*Without oath, by order, dated the day of* ." (*p*)

Where the guardian of an infant defendant is also a co-defendant, and one answer is put in for both; the guardian need only sign the answer once. (*q*)

The other formalities are the same, *mutatis mutandis*, with those observed in putting in the answer or plea of a party under no incapacity. (*r*)

(*g*) Hind. 240.
(*h*) Hind. 242.
(*k*) Hind. 242.
(*l*) For the form of this certificate, see Hind. 247.
(*m*) Hind. 248.
(*n*) Hind. 241.
(*o*) Ibid.
(*p*) Hind. 241.
(*q*) Anon. 2 V. & B. 553.
(*r*) Hind. 242.

Where the guardian who has been appointed to defend an infant resides in London, he may swear to the answer or plea at the public office; (s) but if the guardian reside above twenty miles from London, it is necessary that a commission, or *dedimus*, should be issued to take the answer in the country, unless an order has been obtained to take the answer without oath; in which case, if the appointment of guardian has been made in Court, the *jurat* of the answer states the order for his appointment, and runs thus:

"*Sworn at the public-office, Southampton-buildings, this day of by A. B., guardian of C. D. the infant, pursuant to an order dated the day of before me,*

(*signature of the Master.*") (t)

If the appointment of guardian has been made by commission, and the plea or answer is put in in London, the guardian must attend at the public office, with the answer and certificate of his appointment, and swear to the contents of the plea or answer, and the following *jurat* is then inscribed in the usual manner:

"*Sworn this day of by A. B., guardian of the said C. D., the defendant, assigned pursuant to a certificate dated the day of at the public-office in Southampton-buildings, before me.*"

*The commission for taking the answer (u) of an infant defendant by his guardian, is nearly the same in form and substance as that [*234] issued for taking the answer of an adult defendant in the country, and may now be taken out without order, (x) though formerly such a commission could not be made out by the clerk in court, without an order first obtained for that purpose. (y)

The course of appointing the guardian, and putting in the answer of an infant, by means of two separate commissions, is only resorted to in cases in which both the infant and guardian reside in the country, and in places where they cannot conveniently meet; where, however, they can conveniently meet, it is usual to proceed by one "*commission to appoint a guardian, and to take the answer of the infant by such guardian.*"

On the day appointed for executing this commission, the commissioners and parties having met, the appointment of the guardian is made in like manner as under a commission to appoint a guardian only; the guardian after his appointment exhibits his answer on behalf of the infant, and being duly affirmed or sworn by the commissioners to the truth of it, a certificate of the appointment of the guardian, and the *caption* of the answer by such guardian, is written at the foot of the answer, and subscribed by two of the commissioners (or three, if the defendant's commissioner attend.)

This *caption* is then signed by the commissioners, and the answer being annexed to the commission, the usual return is endorsed upon the commission, and subscribed by the commissioners, the whole is then folded up, and bound round with red tape (the commissioners setting their seals thereon,) and sent to the defendant's clerk in court, in the Six Clerk's Office. (z) The formalities attending the carriage, and of filing the answer, are precisely the same as in the ordinary cases of answering by commission. (a)

(s) Hind. 242. (t) Ibid. 241.

(u) Although for the sake of brevity it is stated in the text to be a commission for taking the *answer* of the infant, it is in fact a commission to take the plea, answer or demurrer.

(x) Order IX. 21st Dec. 1833.

(y) Hind. 242; for further particulars as to the manner of suing out, &c., a commission to take an answer, *vide post*.

(z) Hind. 249, 250. (a) *Vide post*.

[*235] *Where an infant defendant is resident abroad, and the proceeding is for his benefit, a commission may be issued to assign a guardian, and to take his answer at the place of his residence. It appears, however, that in some cases, in order to avoid the difficulty of executing a commission in a foreign country, the Court has upon motion at once assigned a guardian to put in an infant's answer. Thus in *Jongsma* v. *Pfiel*, (*b*) where a motion was made on behalf of an infant defendant, resident abroad, that his father might be assigned his guardian, for the purpose of putting in his answer, which motion was supported by an affidavit that the father was not interested in the matters in difference in the suit, Lord Eldon, with the consent of the plaintiffs, made the order, several similar orders having been produced by the registrar; and in *Lushington* v. *Sewell*, (*c*) where several of the defendants to an original bill were infants, and a commission had been sent abroad, for the appointment of a guardian, and to put in their answers, under which their answers were put in, and afterwards a supplemental bill was filed against the same defendants, the Vice Chancellor, upon motion and consent of the plaintiffs, made an order, that the guardian who put in the answer, to the original bill should put in the answer to the supplemental bill. It is remarkable that in *Tappen* v. *Norman*, (*d*) Lord Eldon refused a similar application, that the mother of an infant defendant, who was resident abroad, might put in his answer as guardian without an appointment in the usual way; it is to be observed, however, that before deciding the question his Lordship asked if there was any instance of such a proceeding, and that the registrar answered that there was not; it is therefore well remarked by the reporter, in his note to *Lushington* v. *Sewell*, that in all probability, if in *Tappen* v. *Norman* the preceding case of *Jongsma* v. *Pfiel* had been cited, the Court would have made the order.

[*236] Although the answer of an infant is put in upon the oath of the person appointed his guardian, (*e*) the infant is not *bound by such answer, and it cannot be read against him; the true reason of which is, because in reality it is not the answer of the infant, but of the guardian, who is the person sworn, and not the infant; and the infant may know nothing of the contents of the answer put in for him, or may be of those tender years as not to be able to judge of it. (*e*) This being the case, it would be useless, and occasion unnecessary expense, to call upon an infant to put in a full answer to the plaintiff's bill; (*f*) and it is therefore held that exceptions will not lie to the answer of an infant, for insufficiency. (*g*)

As exceptions will not lie against an infant's answer, they cannot of course be shown as cause against dissolving an injunction obtained by the plaintiff to restrain proceedings at law commenced on behalf of an infant; consequently, a plaintiff is in general precluded from showing any cause against dissolving an injunction obtained to restrain proceedings at law commenced on behalf of an infant. For as he cannot by exceptions compel a discovery, the answer of the defendant may be, and most usually is such, that no admission can be extracted

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(*b*) 9 Ves. 357.
(*c*) Mad. & Geld. 28.
(*d*) 11 Ves. 563.
(*e*) Eccleston v. Petty, Carth. 79; 3 Mod. 258; Comb. 156; Leigh v. Ward, 2 Vent. 72; Legard v. Sheffield, 2 Atk. 377; Cowdell v. Tatlock, 3 Ves. & B. 19; Savage v. Carroll, 1 B. & B. 548; Cowling v. Ely, 2 Stark. 366; Hawkins v. Luscombe, 2 Swanst. 375.
(*e*) Wrottesley v. Bendish, 3 P. Wms. 236.
(*f*) Strudwick v. Pargiter, Bunb. 338.
(*g*) Copeland v. Wheeler, 4 Bro. C. C. 256; Lucas v. Lucas, 13 Ves. 274; Lord Red. 254.

from it; indeed, if it were a full answer, the plaintiff would not be in a better situation, as the rule of the court prevents its being read against the infant upon any occasion. In *Lucas* v. *Lucas* (*h*) it was argued, that although the rule is, that the answer of an infant may be grossly insufficient, and the plaintiff cannot by taking exceptions compel a discovery from the infant, but must prove his case, yet the rule went no farther, and that an injunction might be dissolved upon an answer manifestly insufficient, and not meeting the equity of the bill. It was held, however, that in all cases the plaintiff was bound to make out his case from the answer; and that unless the Court could from the answer see the equity, it would not interfere with the legal title.

It seems from the above case of *Lucas* v. *Lucas*, and that of *Copeland* v. *Wheeler*, (*i*) that although a plaintiff cannot show exceptions for cause against dissolving an injunction *upon the coming of an infant defendant's answer, he may undertake to show cause upon the merits, and by that means gain a little time till the next day of motions. [*237]

An infant's answer is expressed to be made by his guardian, and is generally confined to a mere submission of his rights and interest in the matters in question in the cause to the care and protection of the Court. The general saving at the beginning, together with the denial of combination at the conclusion, common to all other answers, are omitted; for an infant is entitled to the benefit of every exception which can be taken to a bill without expressly making it, and he is considered incapable of the combination charged. The general traverse is also left out of a defendant's answer, because it cannot be excepted to for insufficiency. (*h*)

Although an infant cannot be called upon to put in a full answer to the plaintiff's bill, yet he may state in his answer any thing which he means to prove in the way of defence. (*i*)

Where an answer has been put in by a guardian on behalf of an infant defendant, and the infant comes of age, and is dissatisfied with the defence put in by his guardian, he may apply to the Court for leave to amend his answer, or to put in a new one; and it seems that this privilege applies as well after a decree has been made as before. (*k*)

An infant, however, wishing to make a new defence, must apply to the Court as early as possible after attaining twenty-one, for if he is guilty of any *laches*, his application will be refused. (*l*) Thus in *Cecil* v. *Lord Salisbury*, (*m*) where an heir-at-law, being a minor, had by his answer desired that the trust estate might not be sold, and had offered to subject other lands not within the trust, for better raising the portions, so that a sale of the trust estate would not be necessary, and the question at the hearing of the cause was, whether he should be bound by this offer in his answer or not, the Court *held him to it, because by that means he had delayed a sale, observing that if he would have departed from what he had offered, he ought immediately to have applied to the Court to have retracted his offer, and amended his answer. It is to be observed, that the cause was heard in 1691, and that the heir-at-law had come of age in 1687, and yet no complaint had [*238]

(*h*) 13 Ves. 274.
(*i*) 4 Bro. C. C. 256.
(*h*) Lord Red. 254.
(*i*) *Per* Lord Chief Baron Richards, in Attorney General v. Lambirth, 5 Price, 398.
(*k*) Kelsall v. Kelsall, 2 M. & K. 409.
(*l*) Bennett v. Leigh, 1 Dick. 89; in Mr. Wyatt's edition of Dicken's Reports, the case of Bennett v. Lee, in 2 Atk. 487 & 529, are referred to as S. C., but upon reference to that book it will be found that the case of Bennett v. Lee, there reported, occurred in 1742, whilst that in 1 Dick. was in 1743.
(*m*) 2 Vern. 224.

been made, either that he had been defrauded or deceived, or that an improper defence had been made, but he had acquiesced in the answer up to that time.

The same reasons which prevent an infant from being bound by his answer, operate to prevent his being bound by admissions in any other stage of proceeding, unless indeed such admissions are for his benefit. Thus it seems that where an infant is concerned, no case can be stated by the Court of Chancery for the opinion of a Court of Law, because an infant would not be bound by the admissions in such case. (*n*) Upon the same principle it has been held, that an infant is not bound by a recital in a deed executed during his infancy. (*o*)

The consequence of this rule is, that where there are infant defendants, and it is necessary, in order to entitle the plaintiff to the relief he prays, that certain facts should be before the Court; such facts, although they might be the subject of admission on the part of adults, must be proved against the infants. Thus where the bill stated that one of the defendants was out of the jurisdiction, and all the defendants, some of whom were infants, admitted the fact, but no proof had been gone into upon the subject, the Vice Chancellor (Sir J. Leach) said, that even if he could act upon the admission of the adult defendants, he could not act upon that of the infants. (*p*) For the same reason, in the ordinary case of establishing a will relating to real estate, where the heir-at-law is an infant, it is always necessary to establish the due execution of the will by the examination of witnesses.

[*239] From the report of the cases of *Cartwright* v *Cartwright*, and *Sleeman* v. *Sleeman*, in Mr. Dicken's Reports, (*q*) it *seems to have been held that where the heir-at-law in an original suit being adult, had by his answer admitted the due execution of the will, but died before the cause was brought to a hearing, leaving an infant heir, who was brought before the Court by revivor, the will must be proved *per testes* against the infant heir. But in *Livesey* v. *Livesey*, (*r*) Sir John Leach, M. R., held, that the circumstance of the first heir having admitted the will, rendered it unnecessary to prove it against the infant; and in a subsequent case, (*s*) the Vice Chancellor, Sir L. Shadwell, expressed himself to be of the same opinion as the Master of the Rolls, and said that he had referred to the entries of the cases of *Sleeman* v. *Sleeman*, and *Cartwright* v. *Cartwright*, in the registrar's book; and that with respect to the former, no such thing as mentioned by the reporter appears to have taken place; but the original heir having admitted the will, the Court established it; and with respect to the latter, all that was stated was, that on hearing the will and proofs read, (not saying what proofs) the Court declared that the will ought to be established. (*t*)

In proceedings in the Master's Office, under a decree which directs witnesses to be examined upon interrogatories, if infants are concerned, the Master cannot, strictly speaking, receive affidavits; and where in such a case he had in a question of pedigree proceeded upon affidavits obtained from America, the Vice Chancellor, on motion for that purpose, directed the Master not to proceed upon the affidavits, with liberty under the circumstances, to apply to the Court, if by death, or otherwise, it became impossible to obtain under a commission the evidence of persons who had made the affidavits. (*u*)

In that case, however, it is to observed, that the solicitor for the infant had

(*n*) Hawkins v. Luscomb, 2 Swanst. 392.
(*o*) Milnor v Lord Harewood, 18 Ves. 274.
(*p*) Wilkinson v. Beal, 4 Mod. 408.
(*q*) 2 Dick. 545, 787.
(*r*) Cited 4 Sim. 132.
(*s*) Lock v. Foote, 4 Sim. 132.
(*t*) *Vide etiam*, Robinson v. Cooper, ib. 131.
(*u*) Tillotson v. Hargrave, 3 Mad. 494.

not concurred in the mode of proceeding adopted by the Master; and that it is to be collected from the report that if he had, the parties would have been bound, as *his Honor said, that generally speaking, infants are bound as much as adults are by the conduct of their solicitor. [*240]

It follows from what has been said above, that where a defendant to a suit is an infant, and it is necessary in support of the plaintiff's case that some fact should be established, which it is not expressly for the benefit of the infant to admit, the answer of the infant must be replied to, and the fact sought to be established proved by evidence derived from other sources than the infant's answer or admissions on his behalf made by those conducting the cause for him. Where, however, the case of the plaintiff is such as it is manifestly to the advantage of the infant to admit, as where an infant claims an interest under the same instrument as the plaintiff, in such cases it is not necessary to reply to the answer, or to go into evidence to prove the execution of the instrument relied upon, and the cause may be set down for hearing upon the bill and answer. For the instrument under which both the plaintiff and the defendant claim, being stated and referred to in the bill, by the usual words, "as in and by the said Indenture, &c., reference being thereunto had, when produced will more fully appear," becomes part of the record, and as it is for the benefit of the infant as well as of the plaintiff that it is set up, no necessity exists for establishing it by any other proof. It is for this reason, also, that the general traverse, which is always inserted in the answer of adult defendants, is omitted in that of an infant; for as no admission can be made on the part of an infant which is not for his advantage, the insertion of such a traverse is unnecessary to protect him against any inference to his disadvantage being drawn from his not having specifically traversed any particular allegation in the bill, whilst by generally traversing all the allegations made by the plaintiff he would be precluded from taking advantage of such as are in his favour.

It is to be observed, that although where the plaintiff and infant defendant claim under the same instrument, it is not in general necessary to reply to the answer, and prove the execution of such instrument; yet where such instrument is in itself in derogation of any other right which the infant, but *for its existence, might have in the subject-matter of the suit, [*241] then, although the infant may take a benefit under the instrument, it will still be necessary to establish its execution by evidence; as where a plaintiff claims as a devisee of real estate, and the infant defendant also claims under the same will, but fills the character of heir-at-law of the testator, in such case the will must be established *per testes*, although the infant has an interest under it as well as the plaintiff. And so in all cases in which any thing is stated in the defendant's answer which the plaintiff does not think proper to admit, the answer should be replied to, in order that the infant defendant may have an opportunity of proving his case.

We have seen before, that no infant can be bound by any admissions made in his behalf, unless such admissions are for his benefit; the consequence is, that in all cases where infants are defendants, the case against them must be established by strict evidence, and that they must have been parties to the suit when the witnesses were examined; if they have become parties subsequently to the evidence being gone into, such evidence cannot be read against them. Thus, where the plaintiffs had filed an original bill, and gone into evidence, and had afterwards amended the bill by adding parties some of whom were infants, a motion made on behalf of the plaintiff that he might be at liberty at the hearing to read the evidence upon the original bill, against the defendants to the amended bill, was refused by the Vice Chancellor, Sir J. Leach, who said, that the defendants who were adult might, if they pleased, consent that the

former evidence should be read at the hearing, but that he could not order such evidence to be read against the infants. (*x*)

There seems to be no rule in the Court of Chancery which prevents the proving of exhibits *vivâ voce*, by order, at the hearing, as well in cases where infants are concerned as in others; in the Court of Exchequer, however, where an infant is party, and his interest is concerned, the Court does not allow of an order to examine a witness *vivâ voce* to prove *deeds or exhibits, but the witness for that purpose must be examined in the office upon interrogatories. (*y*) [*242]

A *subpœna* to hear judgment, where there is an infant defendant, ought to be served on the guardian, *ad litem*; and personal service of such a writ upon the infant himself will not be good service, (*z*) even though the infant should be above fourteen, or want ever so little of twenty-one. (*a*)

The Court will not in general make a decree by consent, where infants are concerned, without first referring it to the Master, to inquire whether it will be for their benefit; yet when once a decree has been pronounced without that previous step, the authority of it is the same as if it had been referred to the Master, and he had made a report that it would be for their benefit; (*b*) and such decree cannot be reversed unless upon such grounds as would authorize the reversal of it in ony other case. It must not, however, be drawn up as made by consent, which would be *error*. (*c*) Although an heir-at-law is entitled to an issue *devisavit vel non*, and the Court cannot refuse it when asked for; yet if the counsel for an infant heir be satisfied that there is no ground to impeach the will, he is well justified in not asking for an issue. (*d*)

Where an infant has a day given him by the decree, to show cause against it, the process served upon him at his coming of age, is a writ of *subpœna*, which is a judicial writ. According to the old practice this writ must have been returnable in term time; (*e*) but according to the new form of *subpœna*, provided by the orders of December 21, 1833, it is made returnable within a certain number of days after service on the defendant, exclusive of the day of service. (*f*) The service of a *subpœna* *of this description must be personal, unless the party has left the kingdom, or has absconded to avoid service; in which case, upon the facts being verified by affidavit, the Court will order service upon his clerk in court to be good service. (*g*) [*243]

If after service of the *subpœna* to show cause, the party does not appear within the time limited, the decree will be made absolute, without entering an appearance for him, (*h*) upon motion, supported by affidavit of service and certificate of non-appearance, in like manner as a decree in default of appearance. (*i*)

It is said above, that in cases of foreclosure, the only cause which can be shown by an infant after attaining twenty-one, against making the decree absolute, is error in the decree, and that he will not be permitted to unravel the account, nor even to redeem the mortgage on paying what is due. This

(*x*) Quantock v. Bullen, 5 Mad. 81.
(*y*) Carleton v. Brightwell, 2 P. Wms. 463.
(*z*) Freeman v. Carnock, 2 Dick. 439. (*a*) Taylor v. Atwood, 2 P. Wms. 643.
(*b*) Wall v. Bushby, 1 Bro. C. C. 487, *supra*.
(*c*) In an anonymous case, in 1 Freem. 127, it is said that if an infant suffer a decree by consent, it is for ever *reversible*, otherwise of an adversary bill; and it is suggested by Mr. Hovenden, in a note which occurs in his edition, that probably this is a typographical error for *irreversible*; this, however, would be inconsistent with the words which immediately follow, viz: otherwise of an adversary bill.
(*d*) Levy v. Levy, 3 Mad. 245. (*e*) Gilb. Forum Rom. 160.
(*f*) 1 Mylne & Keene, App. xxiv. (*g*) Elcock v. Glegg, 2 Dick. 764.
(*h*) Gilb. For. Rom. 160; Wharam v. Broughton, 1 Ves. 185.
(*i*) 1 Harr. 425.

strictness, however, must not be understood as applying to cases in which fraud or collusion have been made use of in obtaining the decree; in such cases, it is presumed that an infant will not be more strictly dealt with than an adult; and in *Lloyd* v. *Barnes*, (*j*) a bill was entertained by the Court which was filed by the heir-at-law of a mortgagor to set aside a decree of foreclosure that had been made against his ancestor, who was adult, under circumstances of gross fraud. Neither, it is apprehended, will the above rule apply to cases where the title claimed by the infant is paramount the mortgage. Thus, in a case where an estate had been conveyed to the great-uncle and grandfather of the infant, as joint-tenants in fee, and upon the death of the great-uncle, the grandfather, being the survivor, had mortgaged the estate, and died, leaving the infant his heir-at law. Upon a bill filed by the mortgagee against the infant to foreclose, the infant stated in his answer that the estate had been purchased and paid for by his great-uncle, who devised the same to his grandfather for life, with remainder to his heirs in tail, and so claimed the estate as heir in tail by a title paramount the mortgage, but the Court decreed an account, and that the *defendant should redeem or be foreclosed, unless he showed cause within six months after he came of age, on the ground that the [*244] grandfather being by the deed joint tenant in fee with his brother, whom he survived, must have appeared to the mortgagee to have a good title. The infant, however, when he came of age upon being served with a *subpœna* to show cause, moved for leave to amend his defence by putting in a new answer, and swore that he believed he could prove that the mortgagee had notice of the trust for his great-uncle at the time he lent the money, which was a point not insisted upon in his former answer, and the Court made the order. (*k*) The reason of this distinction between the case of a claim by the infant paramount the mortgage, and that of a claim subject to the mortgage, is obvious, for in the latter case it will be presumed that the Court would not have made the decree had it not been satisfied that the mortgage was properly executed, and therefore it would not be reasonable to allow a party claiming subject to that deed, to disturb the title which the mortgagee had acquired under it; but in the former case the mortgage may have been properly executed, and the account taken under it may have been perfectly correct, and yet the mortgagor may not have had a title to make the mortgage, in which case it would not be just to preclude the infant from an opportunity of establishing a case which, from the circumstance of its not having been insisted upon in the infant's answer, was not properly submitted to the decision of the Court at the time the decree was pronounced.

In ordinary cases, where an infant has a day given him to show cause against making a decree absolute, he may either impeach the decree on the ground of fraud or collusion between the plaintiff and his guardian, or he may show error in the decree. He may also show that he had grounds of defence which were not before the Court, or were not insisted upon at the hearing, or that new matter has subsequently been discovered, upon which the decree may be shown to be wrong.

If the late infant seeks to controvert the decree on the ground of fraud or collusion, he is not bound to proceed by *way of rehearing or by [*245] bill of review, but he may impeach the former decree by an original bill, in which it will be enough for him to say, that the decree was obtained by fraud or collusion. (*l*) He may in like manner impeach the decree by original

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(*j*) 2 P. Wms. 73. (*k*) Anon. Mos. 66.

(*l*) Richmond v. Tayleur, 1 P. Wms. 737. In the case of gross fraud or collusion used in obtaining a decree, the Court will entertain an original bill for the purpose of impeaching it, even though the party complaining was not an infant at the time of the decree pronounced. *Vide* Lloyd v. Mansel, 2 P. Wms. 73; Sheldon v. Fortescue, 3 P. Wms. 111. In

bill, even though his ground of complaint against it is confined to error; and it is said, in *Richmond* v. *Tayleur*, (*m*) that a very eminent practitioner (Mr. Vernon) in case of an erroneous decree against an infant, used always to advise the bringing of an original bill to set it aside, but in such bill to allege specially the errors in the former decree. In such cases it is not necessary for the infant to wait till he comes of age before he seeks redress, but application for that purpose may be made at any time. (*n*)

If the late infant seeks to impeach the decree by showing that he had grounds of defence, which were either not before the Court or not insisted upon at the original hearing, he may apply to the Court, either by motion or petition, for leave to put in a new answer; and it seems that such application may be made *ex parte*, and is a matter of course. (*o*)

Although it is a matter of course, that were an infant defendant to a suit who has a day given him to show cause against the decree after attaining twenty-one, may have leave to put in a new answer; yet if he was plaintiff in a cross bill, and that suit or any part of it has been dismissed, he will not be allowed to amend his cross bill, or to file a new one for the same matter. (*p*) He may, however, file a bill of discovery in aid of the case intended to be made by his answer, and it seems that if he does so, the time of six months allowed by the [*246] course of the Court for a defendant to show cause why a *decree should not be made absolute after he comes of age, is not so sacred but that in particular cases, and where the matter is of consequence, the Court may enlarge it, and therefore, in the case before referred to, of *Trefusis* v. *Cotton*, (*q*) where a defendant on attaining twenty-one and being served with a *subpœna* to show cause against a decree, filed a bill against the plaintiffs in the original suit for a discovery, and applied to the Court to have the time for showing cause enlarged till the defendants to the bill of discovery had put in their answer; the Lord Chancellor made an order for enlarging the time for three months after the six months were expired, and on that time being out, and the defendants not having put in a full answer, the time was twice enlarged upon motion *quosque*. It seems, however, from a subsequent notice of the the same case, (*r*) that an infant, after he attains twenty-one, cannot controvert the original decree by a new bill praying relief, unless for fraud or collusion, or for error, (*s*) and that if he does so, the original decree may be pleaded in bar to such new bill.

Although where a day is given to an infant to show cause against a decree, he need not, as we have seen, stay till that time before he seeks to impeach it on the ground of fraud and collusion, or error; (*t*) yet if he proceeds on the ground that he is dissatisfied with the defence which has been made, and wishes to put in a new answer, he must in general wait till he has attained twenty-one before he applies, because, if he should apply before, and there should be a decree against him upon the second hearing, he may with as much reason put in a third answer, and make the proceedings endless, and by this means leave it in the power of a guardian to put in a new answer for him during his minority, and so occasion infinite vexation. This was the opinion

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general, however, where no fraud is alleged, the proceedings to set aside a decree, if it has been signed and enrolled, must be by bill of review, or if not signed and enrolled, by supplemental bill in the nature of a bill of review. Walley v. Berkhead, 3 Atk. 811; Gully v. Baker, Ca. Tem. Talb. 201.

(*m*) *Ubi supra.* (*n*) Ibid.

(*o*) Fountain v. Carrier, 1 P. Wms. 504; Napier v. Lord Effingham, 2 P. Wms. 401; Bennett v. Lee, 2 Atk. 531; Trefusis v. Cotton, Mos. 308.

(*p*) Sir J. Napier v. Lady Howard of Effingham, Mos, 67–68.

(*q*) Mos. 203. (*r*) Ibid. 306.

(*s*) Richmond v. Tayleur, *ubi sup.* (*t*) Ibid.

originally expressed by Lord Hardwicke, in the case of *Bennett* v. *Lee*; (*u*) though he afterwards held, in the same case, that as the facts upon which the infant wished to rest his new defence were of long standing, and the witnesses were consequently very old, and might *die before he came of age, the infant might put in a better answer. (*x*) And so in *Savage* v. *Carrol*, (*y*) leave was given to the infant defendant, upon the same grounds, to put in an amended answer before attaining twenty-one; but it was subsequently held in the same case, that were an infant before attaining twenty-one obtains leave to put in a new answer, he will thenceforth be considered as plaintiff, and as such will be bound by the decree. [*247]

Where an infant defendant on coming of age, having obtained leave to put in a new answer, does so accordingly, he may show that fact for cause why the decree should not be made absolute, and the plaintiff must proceed upon the answer according to the rules of the Court in other cases. (*z*)

The consequence of an infant putting in a new answer is, that if it is replied to he may examine witnesses anew to prove his defence, which may be different from what it was before. (*a*)

An infant may be committed for a contempt; (*b*) and it seems that where an infant is ordered by a decree or order made in a cause to convey an estate, or to do any other act, the performance of the decree may be enforced by attachment; but where an infant is not a party to a cause, but has been ordered to convey under the statute as an infant trustee, an attachment is not a proper course; but an order should be obtained for the infant to convey within a week after service; and if he does not obey that order, a motion must be made that he stand committed unless cause shown. (*c*)

It has been before observed, that an infant defendant pays no costs of a contempt occasioned by his not appearing or answering; and that in such a case, where he is brought into Court, the costs of the messenger is usually paid by the plaintiff; this is because an infant cannot be made personally liable to the payment of costs; (*d*) and till the appointment of a guardian has taken place, there is no person upon whom *such liability can be fixed. But although an infant cannot be made personally liable to costs, there are instances in which his costs have been ordered to be paid out of his share of the fund in Court; (*e*) and where an infant is a party to a bill for a partition, the costs to which he is liable should be directed to be borne by his share. (*f*) [*248]

SECTION VIII.

Persons of Weak Intellect.

A PERSON reduced by *age or infirmity* to a second infancy may defend by *guardian*. In this case a special application should be made on his behalf by

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(*u*) 2 Atk. 487.
(*x*) Bennett v. Lee, 2 Atk. 532, *vide etiam*, 1 B. & B. 548.
(*y*) 2 B. & B. 244.
(*z*) Cotton v. Trefusis, Mos. 315.
(*a*) Napier v. Lord Effingham, *ubi supra*.
(*b*) Toth. 108.
(*c*) *In re* Beech, 4 Mad. 128.
(*d*) Turner v. Turner, 1 Stra. 708.
(*e*) *Vide* Earl of Orford v. Churchill, 3 V. & B. 67.
(*f*) Agar v. Fairfax, 17 Ves. 557.

motion or petition, supported by an affidavit, stating the particular circumstances of the party, and praying a commission to appoint a guardian. In such cases, if the fact of the infirmity is not disputed, the order will be made without a reference to the Master; but if it is disputed whether the defendant is competent or incompetent to answer, it will be referred to the Master to inquire as to the fact. In *Lee* v. *Ryder*, (*a*) which was a case of this description, the following order was made: "This Court doth order that it be referred to Mr. Cross, one, &c., to inquire whether the defendant, J. T., is competent to answer the plaintiff's bill without the appointment of a guardian for that purpose; and for the purpose of such inquiry it is ordered, that the defendant, J. T., do attend the Master from time to time, as he shall direct; and that the Master is to be at liberty to call in such medical attendance as he may think necessary in making such inquiry; and that the Master is to state the result of such inquiry, with his opinion thereon, to the Court, whereupon such further order shall be made as shall be just." (*b*)

There appears to be no doubt that in cases of this nature a commission to appoint a guardian may be issued, whether it be a town or a country cause, [*249] and that such a commission *may be executed any where. The order for the commission being drawn up, passed and entered, commissioners' names must be left with the defendant's clerk in court, to be inserted in the commission, which in no case differs from the form of a commission to appoint a guardian to an infant, except in stating that the party is incapable by age or infirmity; and the proceedings under a commission of this kind are, *mutatis mutandis*, the same as in executing a commission to appoint a guardian to an infant.

It is said that the answer of a superanuated person put in by guardian, may be read against him as an answer of one of full age put in in person; and that the difference in this respect between such an answer and that of an infant put in by guardian is, because an infant improves and mends, and therefore is to have a day to show cause after he comes of age; but the other grows worse, and is to have no day. (*c*)

SECTION IX.

Of Bankrupts and Insolvent Debtors.

It is a general rule of Courts of Equity, that no person can be made a party to a suit in equity against whom no relief can be prayed; and it follows as a consequence of this rule, that no person whose interest in the subject-matter of the suit has been vested by act of law in another, can be made a defendant; consequently, it has been held, that bankrupts and insolvent debtors, whose interests, whether legal or equitable, in the property, must have devolved upon their assignees, cannot be made parties to suits relative to any property which is affected by their bankruptcy or insolvency. (*a*)

Upon this principle, a demurrer put in by a bankrupt who was joined as a co-defendant with his assignees in a bill to enforce the specific performance of an agreement entered into by him previously to his bankruptcy, was allowed; (*b*)

(*a*) Mad. & Geld. 294. (*b*) Reg. Lib. B. 1821, fo. 435.
(*c*) Leving v. Caneley, Prec. Ch. 229.
(*a*) Whitworth v. Davis, 1 Ves. & B. 547; Golls v. Ward, 3 P. Wms. 311, n. 1.
(*b*) Whitworth v. Davis, 1 V. & B. 545; *vide etiam*, Griffin v. Archer, 2 Anst. 478; Lloyd v. Lander, 5 Mad. 288.

and so *in *Collet* v. *Wollaston*, (c) where a bill was filed by the purchaser, at an auction, of the reversionary interest of an insolvent debtor in certain stock against his assignee for an assignment and transfer, one of the questions at the hearing of the case was, whether the insolvent himself ought not to have been made a party; but the Master of the Rolls (Lord Alvanley) declared his opinion to be that he was not a necessary party; but as the reversionary interest appeared to have been sold for a very low price, he said, that before he decreed a specific performance of the contract, he would direct an inquiry into its value. [*250]

It is said by Lord Redesdale, that although a bankrupt, made a party to a bill against his assignees touching his estate, may demur to the relief, all his interest being transferred to his assignees, yet it seems to have been generally understood, that if any discovery is sought of his acts before he became a bankrupt, he must answer to that part of the bill for the sake of the discovery, and to assist the plaintiff in obtaining proof, though his answer cannot be read against his assignees, otherwise the bankruptcy might entirely defeat justice. (d) Upon the same principle it seems also to have been considered, that where a person having had an interest in the subject of a bill has assigned the interest, he may yet be compelled to answer with respect to his own acts before the assignment. (e)

Considerable doubt, however, appears to be thrown upon the correctness of the rule which requires a bankrupt to answer for the sake of the discovery only, by the judgment of Sir Thos. Plumer, in *Whitworth* v. *Davis* before referred to, (f) in which a bankrupt, who had been made a party to a bill for a specific performance of an agreement, demurred, his Honor, after disposing of the argument which had been urged to show that the bankrupt was properly made a party, in respect of the interest he had in the subject, on the ground that all legal and equitable interest in the property devolved upon the assignees, and that they only were necessary to sustain the case in point of interest, and therefore the bankrupt was not a necessary party, goes on to say: "The other ground alleged in support of *the bill is more questionable, whether the bankrupt is not a proper party for the purpose of discovery and to sustain the injunction, if his answer affords ground for it. Sir Samuel Romilly stated the practice to be, to make the bankrupt a party, with the view to read his answer, for the purpose of sustaining the injunction against his assignees; and that receives some authority from what is stated by Lord Redesdale. (g) No authority is cited for that, but Lord Redesdale's judgment is confirmed by the intimation from the bar, of the current opinion that the bankrupt may, for the purpose of discovery, be a party in a bill for an injunction. I have not been able to find a case that supports that opinion, but the knowledge that it is the received practice is sufficient to induce me not lightly to disturb it. There is certainly great convenience in this, as in such a case all the transaction may be known to the bankrupt alone, and the party seeking relief would be entirely deprived of it, as far as regards the injunction, if a discovery cannot be obtained from the only party having a knowledge of the transaction. There is, however, a difficulty, consistently with the rule and principle, to conceive how the bankrupt's answer can be read against his assignees, even for the purpose of an injunction, when clearly it could not be read against them at the hearing. The case of *Glassford* v. *Jeffrey*, in the Court of Exchequer, which was cited as an authority for reading the bankrupt's answer against his assignees, affords no assistance upon this point, all the assignees having put in distinct answers, craving leave to refer to the answer of the [*251]

(c) 3 Bro. C. C. 228.
(d) Lord Red. 133.
(e) Lord Red. 133.
(f) 1 V. & B. 545.
(g) *Supra*.
(h) 2 Anst. 478; cited 2 Ves. jun. 643.

bankrupt and the schedules to that answer, not having any knowledge themselves upon the subject; in that instance, therefore, the bankrupt's answer was properly read against them. There is one direct authority that the bankrupt ought not to be made a party even for the purpose of discovery, *Griffin* v. *Archer*; (*h*) the note is short, but I have inquired from the judges who decided that case, and find the report of the decision, that the demurrer was allowed, is correct. The case of *King* v. *Martin* (*i*) does not bear upon the subject; the opinion of the Court being, that there might be relief against the bankrupt upon [*252] the *fraud, who is stated expressly to be a material party against whom a decree might be made. There was another late case, *Cooke* v. *Marsh*, (*k*) in which I understand, from general information only, that the demurrer was allowed; but I do not find distinctly that it was the demurrer of the bankrupt.

"The case standing thus, upon the authorities, how is it upon principle? The case of *Fenton* v. *Hughes* (*l*) lays down a broad principle that would exclude this bankrupt as a party; viz: that a person who has no interest, and is a mere witness, against whom there could be no relief, ought not to be a party; a bankrupt stands in that situation, a competent witness, having no interest, against whom, therefore, no relief can be had at the hearing; he falls precisely within that general rule; and the cases of exception, stated by the Lord Chancellor, do not comprehend him. So, in the case of *Le Texier* v. *The Margravine of Anspach*, (*m*) where the general rule is laid down, the case of a bankrupt is not stated as constituting an exception; the principle is certainly against making him a party; and the instance of exception put by the Lord Chancellor, in *Fenton* v. *Hughes*, is mentioned, not with approbation, but as standing upon authority only, having been introduced by Lord Talbot, not upon a very satisfactory principle. The conclusion is, therefore, that the bankrupt is within the principle, and is not one of the persons included in the exceptions. Therefore, upon principle, and the direct authority of the Court of Exchequer, opposed by no decision, this bankrupt ought not to be made a party even for the purpose of discovery. It is not, however, necessary to decide that in this case, and merely stating the result of my inquiries, I desire not to be understood as opposing my opinion, though formed upon a consideration of the principle and authorities, to any current opinion prevailing as to the practice; this bill being framed with the view of considering the bankrupt as having such an interest that relief may be had against him, involving him in the charges with the other defendants, and praying relief generally against him, considered as a proper party against whom the prayer of relief ultimately may [*253] be sustained, *he could not move for the costs as a defendant against whom discovery only is prayed, and no decree can be made. It is then, perfectly clear, that relief being prayed against a defendant, who can be a party only for the purpose of discovery, he may demur upon that ground that relief is prayed against this bankrupt, when at all events a discovery only can be sought against him; it seems to me, that without determining the general question, this demurrer may be sustained."

The decision of Sir Thomas Plumer, just quoted, still leaves it doubtful whether a bankrupt can be made a party to a bill against his assignees for the mere purpose of discovery and injunction; but there is no doubt that if he is made a party for the purpose of obtaining relief against him, he may demur to the bill, and that in such case his demurrer will protect him from the discovery as well as the relief; where, however, fraud or collusion is charged between the

(*i*) 2 Ves. jun. 641.
(*l*) 7 Ves. 287.
(*k*) In Chan. Trin. 1811.
(*m*) 15 Ves. 159.

bankrupt and his assignees, the bankrupt may be made a party, and he cannot demur, although relief be prayed against him. Thus, where a creditor having obtained execution against the effects of his debtor, filed a bill against the debtor, against whom a commission of bankrupt had issued, and the persons claiming as assignees under the commission, charging that the commission was a contrivance to defeat the plaintiff's execution, and that the debtor having by permission of the plaintiff possessed part of the goods taken in execution for the purpose of sale, and instead of paying the produce to the plaintiff had paid it to his assignees, a demurrer by the alleged bankrupt, because he had no interest and might be examined as a witness, was over-ruled. (*n*)

Upon the same principle, where a man had been fraudulently induced by the drawer to accept bills of exchange without consideration, and the drawer afterwards indorsed them to others, upon a bill filed against the holder and drawer of the bill of exchange for a delivery up of the bill, and an injunction, the drawer pleaded his bankruptcy which took place after the bill filed, in bar to the bill, and the Vice Chancellor over-ruled the plea. (*o*)

*Where a defendant becomes bankrupt after the commencement of the suit, the bankruptcy is no abatement, and the plaintiff has [*254] his choice either to dismiss the bill and go in under the bankruptcy, or to go on with the suit, making the assignees parties by supplemental bill. (*p*) It seems, that in *Knox* v. *Brown*, (*q*) Lord Thurlow permitted the plaintiff to dismiss his own bill without costs, because it was by the act of the defendant himself that the object of the suit was gone. In a subsequent case, however, of *Rutherford* v. *Miller*, (*r*) the Court of Exchequer refused to make such an order without costs, and in *Monteith* v. *Taylor*, (*s*) where a motion was made on behalf of the defendant, who had become bankrupt, to dismiss the plaintiff's bill with costs, for want of prosecution, Lord Eldon, although he at first entertained a doubt whether he could make such an order with costs, afterwards expressed an opinion against the plaintiff upon that point, upon which the plaintiff submitted to give the usual undertaking to speed the cause.

After what has been said, it is scarcely necessary to observe, that where a party who is a defendant to a suit becomes bankrupt, or takes advantage of the Insolvent Debtor's Act, it will be necessary for the plaintiff, if he proceeds with the suit, to bring the assignees before the Court by a supplemental bill; and it has been decided, that where the assignee of an insolvent has been already before the Court as a defendant, and such assignee die or is removed, and a new assignee is appointed in his stead, the suit abates, and that the 26th sect. of the 7 Geo. 4, c. 57, applies only to cases where the assignee is plaintiff, and not to cases where he is a defendant. (*t*)

As a similar section occurs in the Bankrupt Act, 6 Geo. 4, c. 16, s. 7, it is presumed that a similar construction would be put upon it. (*u*)

Where a bill has been filed against a defendant who afterwards *becomes bankrupt, and a supplemental bill is in consequence filed [*255] against his assignees, the evidence taken in the original cause previously to the bankruptcy may be read at the hearing against the assignees; but where it appeared that some of the witnesses in the cause had been examined after the commission issued, and before the supplemental cause was at issue, the Vice

(*n*) King v. Martin, 2 Ves. jun., 641; cited, Lord Red. 132.
(*o*) Mackworth v. Marshall, 3 Sim. 368. (*p*) Monteith v. Taylor, 9 Ves. 615.
(*q*) 2 Bro. C. C. 186. (*r*) 2 Anst. 458.
(*s*) *Supra.*
(*t*) Bainbridge v. Blair, Youngs, E. R. 389; Mendham v. Robinson, 1 Mylne & Keene, 317; *vide ante*, p. 85.
(*u*) *Vide ante*, p. 86.

Chancellor allowed an objection to reading their depositions, but over-ruled it so far as it extended to the witnesses who had been previously examined. (x)

Where a mortgagor had taken advantage of an Insolvent Act and the provisional assignee was made a party to a bill to foreclose, and he put in answer claiming no interest in the premises, except such as he was entitled to as provisional assignee, it was held that the plaintiff ought to pay him his costs and add them to his debt. (y) In a previous case, however, before Sir J. Leach, M. R., where a bill of foreclosure had been filed against the assignees of the mortgagor, who was an insolvent debtor, the Master of the Rolls held that the assignees were not entitled to their costs, although they had by their answer disclaimed all interest, and said that they would have released the equity of redemption if any application for that purpose had been made to them. (z)

SECTION X.

Persons Outlawed and Attainted, or Convicted of Treason or Felony.

It is said that all persons disabled by law to institute or maintain a suit may, notwithstanding, be made defendants in a Court of Law, and cannot plead their own disabilities; (a) and *it is presumed that this rule would also be adopted in Courts of Equity, where the suit seeks to establish a pecuniary demand against the party; where however the proceeding is *in rem.*, and a person under any of the disabilities alluded to is interested in the object of the suit, then it would seem that as the interest of the party is entirely vested in the Crown, the Attorney General would be the proper defendant. (b) Whether in such case the party himself should be joined, is a point which does not appear to have been determined, but it is submitted that the rule before laid down, viz: that no person can be made a party to a suit against whom no relief can be prayed, will apply to this case as well as to that of bankrupts and insolvents.

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SECTION XI.

Paupers.

Although the statute 11 Hen. 7, c. 12, before referred to, as that under which the practice of admitting parties to sue *in formâ pauperis* originated, does not extend to defendants, and consequently a defendant in an action at law is never allowed to defend it as a pauper; (c) yet a greater degree of liberality is practiced in Courts of Equity, and a defendant who is in a state of poverty,

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(x) Hitchens v. Congreve, 4 Sim. 420. (y) Woodward v. Haddon, 4 Sim. 606.

(z) Collins v. Shirley, 1 Russ. & M. 638.

(a) Treatise on Star Chamber, part 3, sec. 6. (2 Collect. Jurid. 140.) It is said in the above Treatise, that persons attainted of treason or felony are excepted out of this rule; but it has been decided in many cases, that a defendant cannot plead his own attainder to an action brought against him for debt or trespass. Banyster v. Trussell, Cro. Eliz. 516; Coke's Entries, 246, *vide etiam*, Ward and Prestall's Cases, in 1 Leon. 329; and Vin. Ab. Attainder, [B.] 3.

(b) *Vide* Balch v. Wastall, 1 P. Wms. 445; Hayward v. Fry, ib.; Rex v. Fowler, Bunb, 38.

(c) 1 Tidd. 88.

and as such incapable of defending a suit, may, as well as a plaintiff, obtain an order to defend *in formâ pauperis*, upon making the same affidavit of poverty as that required to be made by a plaintiff. Indeed, originally the right of admission *in formâ pauperis* appears to have been confined to defendants. By Lord Bacon's orders, it is said, "that any man shall be admitted to defend *in formâ pauperis* upon oath, but for plaintiffs they are ordinarily to be referred to the Court of Requests or to the provincial counsels, if the case arise in the *jurisdiction, or to some gentleman in the country, [*257] except it be in some special cases of commiseration or potency of the adverse party." (*d*)

To entitle a party to defend a pauper, he must make the same affidavit as is required from a plaintiff applying to sue in that capacity; and it seems that if he is in possession of the property in dispute, though it be ever so small, he cannot be admitted, or if admitted, he may, upon the fact being afterwards shown to the Court, be dispaupered. (*e*) In this and in most other respects, the rules laid down with regard to persons suing *in formâ pauperis*, are applicable to persons defending in that character; the only difference being in the form of application for admission, the petition for which, in the case of a defendant, is much shorter than in the case of a plaintiff, and is not required to contain any statement of the case. Nor is it necessary, in the case of a defendant, that the petition should be accompanied by any certificate of counsel. (*f*)

SECTION XII.

Of Persons out of the Jurisdiction of the Court.

WHERE a suit affects the rights of persons out of the jurisdiction, the Court will in some cases, where there are other parties concerned, proceed against those other parties, and if the absent persons are merely passive objects of the judgment of the Court, or their rights are incidental to those of the parties before the Court, a complete determination may be obtained without them. (*a*) Thus in *Attorney General* at the relation of the *University of Glasgow* v. *Baliol College*, (*b*) which was an information filed, impeaching a decree made in 1699, on a former information by the Attorney General against the trustees of a testator, his heirs-at-law and others, to establish a will and a charity created by it, alleging that the decree was contrary to the will, and that the University of Glasgow had not been made a party to the suit; Lord Hardwicke overruled *the latter objection, as the University of Glasgow was a corporation out of the reach of the process of the Court, which circumstance warranted the proceedings without making that body party to the suit. (*c*) [*258]

And so where a bill was filed for the recovery of a joint debt against one of two partners, the other being out of the kingdom, the question before the Court was, whether the defendant should pay the whole or only a moiety of the debt, and Lord Hardwicke was of opinion that he ought to pay the whole. (*d*) Upon the same principle a bill may be brought against one factor without his companion, if such companion be beyond sea; (*e*) and where there were two executors, one of whom was beyond sea, and a bill was filed by a residuary lega-

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(*d*) Beames's Ord. 45.
(*e*) Spencer v. Bryant, 11 Ves. 49; *vide etiam*, Prac. Reg. 321.
(*f*) 2 Harr. 390.
(*a*) Lord Red. 25.
(*b*) Dec. 11, 1744.
(*c*) Lord Red. 25, n. (*g*).
(*d*) Darwent v. Walton, 2 Atk. 510.
(*e*) Cowslad v. Cely, Prec. Ch. 83.

tee against the other to have an account of his own receipts and payments, the Court, upon an objection being taken at the hearing, on the ground of the absence of the co-executor, allowed the cause to go on. (*f*)

In bills of interpleader, also, a plaintiff may proceed with his suit and obtain an injunction against a party resident in this country, although the other parties claiming the property are out of the jurisdiction. (*g*) In such cases, however, the plaintiff is bound to use prompt diligence to get the parties who are absent to come in and interplead with those who are present. If, however, he does not succeed in doing so within a reasonable time, the consequence is, that the party within the jurisdiction must have that which is represented to be the subject of competition, and the plaintiff must be indemnified against any proceeding being afterwards taken on the part of those who are out of the jurisdiction. "For this purpose, if the plaintiff can show that he has used all due diligence to bring persons out of the jurisdiction to contend with those who are within it, and they will not come, the Court upon that default, and their so abstaining from giving him an opportunity of relieving himself, would, if they afterwards came here and brought an action, order service on their attorney to [*259] be good service, and injoin *that action for ever, not permitting those who refused the plaintiff that justice, to commit that injustice against him." (*h*)

Upon the same ground it has been determined, that where a party to a bill of interpleader who has been served, will not appear, and stands out all the process of contempt, the bill may be taken *pro confesso* against him, and he will be decreed to interplead with the other defendants. (*i*)

Where, however, the person who is out of the jurisdiction is one whose interests are principally affected by the bill, the Court cannot proceed in his absence, even though the parties, having the legal estate, are before the Court; thus where a judgment-creditor, who had sued out an *elegit* upon his judgment, filed a bill for equitable execution against real estates, which were vested in trustees upon certain trusts, the Court would not proceed with the cause, because the equitable tenant for life, subject to the trusts, was abroad. (*j*) Upon the same principle it has been held, that bail cannot maintain an injunction against a creditor, who has recovered a verdict, where the principal debtor is out of the jurisdicton. (*k*)

In a recent case, where a contract for the sale of an estate in the West Indies, had been entered into by a person who resided there, and had got into possession without paying the purchase-money, and a suit was instituted in this country by the vendor against the consignees appointed by the purchaser, Lord Lyndhurst, C., refused to entertain a motion for a receiver of the proceeds of the consignments, on the ground that the purchaser, who was the principal defendant, was abroad, and had never been served with a *subpœna*. (*l*) Upon the same ground the Vice Chancellor, Sir J. Leach, in *Coward* v. *Chadwick*, (*m*) refused a motion by a second mortgagee for the appointment of a receiver where the mortgagor was out of the jurisdiction. (*n*)

(*f*) Ibid.

(*g*) Stevenson v. Anderson, 2 Ves. & B. 407.

(*h*) *Per* Lord Eldon, 2 V. & B. 412, *vide etiam*, Martinius v. Holmuth, ib. 412, n; Cooper, 245, S. C.

(*i*) Fairbrother v. Prattent, Dan. Exc. Rep. 64, and the decree, ib. 69, n. (*c*).

(*j*) Browne v. Blount, 2 Russ. & M. 83. (*k*) Roveray v. Grayson, 3 Swan, 145, n.

(*l*) Stratton v. Davidson, 1 Russ. & M. 484.

(*m*) 2 Russ. 150, n.

(*n*) By recent statutes great facilities have been given to the carrying on suits against parties out of the jurisdiction, by authorizing the service of *subpœnas*, and other proceedings upon them. *Vide post*, 277, *et seq.*

*With respect, however, to the appointment of a receiver, in the [*260] absence of the mortgagor, the practice has undergone considerable alteration in consequence of the decision of Lord Eldon, in *Tanfield* v. *Irvine*; (o) in that case an application for a receiver had been made to the Vice Chancellor, Sir J. Leach, by the grantee of an annuity, which was secured by an equitable charge upon an estate, though the grantor had gone abroad and had not appeared to the suit, and the application was refused on the ground that the Court had not jurisdiction to deprive a man, who was not present, of the possession of his estate: but upon the motion being renewed before Lord Eldon, he made the order for a receiver, but guarding it, however, in such a way as not to prevent any person having a better title to the possession of the estate, from ousting him if they pleased. His Lordship observed, that he did not see why the rights of the equitable mortgagee were to be taken away, by the circumstances that the mortgagor had not entered an appearance, and could not he compelled to do so. The rights of a second mortgagee might be delayed to all eternity, if the residence of the mortgagor out of the jurisdiction were to have the effect which the Vice Chancellor had given it. (p)

It is usual, in cases where any of the persons who, if resident in this country, would be necessary parties to a suit are abroad, to make such persons defendants to the bill, charging the fact of their being abroad, and praying that they may be served with process when they come within the jurisdiction: (q) and although it appears to have been, at one time, considered that the omission of their names in the prayer of process would not render the record defective, (r) it has recently been determined that it is necessary to pray process against them, and that a bill which omits to do so is liable to demurrer. (s)

Where a necessary party is charged in the bill to be out of the jurisdiction of the Court, it will be requisite that the fact should be either admitted or proved at the hearing; and it is to be observed, that where some of the parties to the suit are abroad, and others are infants, the fact of their being abroad *must be proved, and the Court will not act upon an admission of [*261] such a fact on the part of the infant defendants. (s)

Where a party alleged in the bill to be out of the jurisdiction of the Court, subsequently becomes amenable to it, he may, if process has been prayed against him, be served with such process. If process has not been prayed against him, the bill must be amended for the purpose of praying it, if the state of the proceedings will admit of such amendment, if they will not, a supplemental bill must be filed against him. (t) In *Capel* v. *Butler*, where a party who was named as a defendant, but had never been served with a *subpœna*, appeared by counsel at the hearing, and consented to be bound by the decree, the defect arising from his not having been served or answered was held to be cured. (u)

In some cases, where a defendant has been abroad during the proceedings in a cause, he has been allowed to come in after a decree has been pronounced, and to have the benefit of it without the process of filing a supplemental bill; thus, in *Banister* v. *Way*, (w) after a decree pronounced establishing a will, and directing the necessary accounts, some of the residuary legatees, having been abroad, applied to have the benefit of the decree, submitting to be bound

(o) 2 Russ. 149.
(p) *Vide* the order made in this case, 2 Russ. 152.
(q) Lord Red. 134.
(r) Haddock v. Thomlinson, 2 S. & S. 219.
(s) Taylor v. Fisher, Rolls, Sittings after Hil. T. 1835, MS.
(s) Wilkinson v. Beal, 4 Mad. 408. As to what will be sufficient *primâ facie* evidence that a defendant is out of the jurisdiction, *vide* Johnson v. Compton, 4 Sim. 46.
(t) Lord Red. 134.
(u) 2 S. & S. 457.
(w) 2 Dick. 687.

by it, and an order was made, (they submitting to the decree) that they should be at liberty to enter their appearance by their clerks in Court, and that they should have the like benefit of the decree as if they had put in an answer, and had appeared at the hearing of the cause. A similar order was made by Lord Lyndhurst, C., after a cause had been heard upon further directions. (*x*)

It is to be observed, that where a defendant is stated to be abroad, and process is prayed against him when he shall come within the jurisdiction of the Court, he is in substance not a party to the suit, (at least till he has been served with process.) and therefore, under such circumstances, where one of the defendants was abroad, and had not put in an answer, but all the other defendants had answered, it was held that an order *to amend, obtained [*262] after the expiration of six weeks from the time when the answer of the last of the defendants who had answered was put in, was irregular, according to the 13th of the Orders of the 3d April, 1828, and could not be supported, on the ground that the defendant who was abroad had not yet put in his answer. (*y*)

It appears to have been formerly considered, that service of a *subpœna* abroad was good service, and that the defendant might afterwards be attached upon it when he came to this country; (*z*) and the cases usually referred to in books of practice, in support of this proposition, are *Scott* v. *Hough*, (*a*) and *Shaw* v. *Lindsay*. (*b*) It has since, however, been established, that those cases are of no authority, as it has been found that in the case of *Bourke* v. *Macdonald*, (*c*) upon the authority of which Lord Thurlow appears to have acted in *Scott* v. *Hough*, above referred to, no order was made; and that in *Shaw* v. *Lindsay*, the order was finally refused by Lord Eldon. Upon this ground, in *Fernandez* v. *Corbin*, (*d*) the Vice Chancellor, Sir L. Shadwell, discharged an order for an attachment, which had been obtained against a defendant who had not appeared to a *subpœna* served in Guernsey, as irregular. In a previous case, (*e*) his Honor had granted an attachment for non-appearance to a *subpœna* served abroad; but it was upon the ground that, in the course of correspondence between the solicitors, the defendant's solicitor had acknowledged the service of the *subpœna*. It is to be observed that now, by the statute 2 Will. 4, c. 33, extended by 4 & 5 Will. 4, c. 83, process may, in certain cases, be served with effect upon parties resident out of the jurisdiction. (*f*)

But independently of these statutes, courts of equity have in some cases the power of enforcing obedience to their process, by defendants who are out of their jurisdiction, by restraining the assertion of their legal rights in a manner prejudicial to the plaintiffs, until they have rendered themselves amenable to the jurisdiction. This power is chiefly exerted where actions at [*263] law are *brought by persons resident abroad to enforce demands against a party, which, although they have, strictly speaking, a legal right to make, it is against the principles of equity to permit. In such cases, the Court will interfere by injunction served upon the attorney employed in this country to conduct the proceedings at law, to restrain the further prosecution of such proceedings until his employer has submitted himself to the jurisdiction. (*g*)

In order to accomplish this purpose, it is necessary, in the first instance, to obtain an order, directing that service of the *subpœna* upon the attorney

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(*x*) White v. Hall, 1 Russ. & M. 332.
(*y*) King of Spain v. Hullett, 3 Sim. 339.
(*z*) 1 Newl. 66.
(*a*) 4 Bro. C. C. 213.
(*b*) 18 Ves. 496.
(*c*) 2 Dick. 587.
(*d*) 2 Sim. 544.
(*e*) Nichol v. Gwyn, 1 Sim. 389.
(*f*) *Vide post*, p. 277 *et seq.*
(*g*) *Per* Lord Thurlow, Anderson v. Lewis, 3 Bro. 429.

employed in the cause at law shall be deemed good service. The application for this order in the Court of Chancery, must be supported by an affidavit, verifying the facts in the bill, usually denominated an affidavit of merits. In the Court of Exchequer, the affidavit of merits is made on the motion for the injunction; and such was held to be the practice of the Court of Chancery by Lord Thurlow, in *Burke* v. *Vickars:* (*h*) in a previous case, (*i*) however, his Lordship had been of a different opinion, and his first determination has been subsequently followed. (*j*)

It seems that the affidavit in this case must be made by the plaintiff in equity himself, and that unless the solicitor has personal knowledge of the merits of the cause, his affidavit will not be sufficient. (*k*) It has also been decided, that in Chancery it is *not* necessary that the affidavit should state a previous refusal by the attorney to accept a *subpœna.* (*l*)

The practice in the Court of Exchequer as stated by Mr. Fowler (*m*) requires the attorney of the defendant at law to apply to the plaintiff's attorney to know if he will accept of a *subpœna* to appear, and that the *subpœna* shall be formally tendered to him. (*n*) If he refuse to accept it, an affidavit is made of such application and refusal, and the Court will, upon motion, make an order for service of the *subpœna* upon the *attorney to be good [*264] service. In support of this motion in the Exchequer no affidavit of merits is required; (*o*) and if the attorney, upon being served pursuant to the order, neglect to enter an appearance upon the expiration of the return of the *subpœna*, an attachment must be issued, and a motion may then be made for an injunction, which must be supported by an affidavit of the merits of the bill. And so if the attorney appears, but does not answer, when the time for answering is expired, an attachment *pro formâ* is made out, and, upon producing this to the Court, and reading an affidavit verifying the facts stated by the bill, the Court, if satisfied with the merits of the case, will grant an injunction till answer or further order. (*p*)

A motion for substituted service is generally made without notice; in the following case, however, the Court of Exchequer held that notice was necessary. An agent had effected a policy for his principal, who resided in Spain, and afterwards brought an action in his own name only against the underwriters and others, who filed a bill for an injunction against both the principal and agent; the agent appeared and answered and in eight days the usual affidavit of merits was sworn, and a motion was made for an injunction against the principal, the counsel for the agent, however, objected to the motion for want of notice, and the Court held, that though in ordinary cases notice is not necessary, yet that it was so in the present case, the action having been brought in the name of the agent only. (*q*)

The Court, it is said, does not expect a plaintiff to verify all the allegations in his bill with the same precision that is required in an answer; it will be sufficient if he substantiate the general heads of equity, which will entitle him to an injunction; (*r*) but a material variance between the bill and the affidavit would be fatal. Thus where the bill stated that bills of exchange, which were

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(*h*) 3 Bro. C. C. 24. (*i*) Delancy v. Wallis, ib. 12.

(*j*) Stephen v. Cini, 4 Ves. 359; Fullarton v. Wallace, ib. 360, n.; Anderson v. Darcey, 18 Ves. 447; White v. Klevers, ib. 471; Kenworthy v. Accunor, 3 Mad. 550; Bailie v. Larkens, cited ib.

(*k*) Kenworthy v. Accunor, *ubi sup.* (*l*) French v. Roe, 13 Ves. 593.

(*m*) 1 Fowl. Ex. Pr. 223.

(*n*) East India Company v. Collins, 6 Price, 404.

(*o*) Gilliat v. Wright, Fowl. Ex. Pr. 126. (*p*) 1 Fowl. Ex. Pr. 223, *et seq.*

(*q*) Crew v. Mertin, 1 Fowl. Ex. Pr. 225. (*r*) Nunes v. Jaffray, ib. 226.

the subject of the action, were lent for the defendants accommodation, whereas the affidavit stated that they were given to the defendant to pay the [*265] balance of *his account to the plaintiffs, which they afterwards found to be erroneous. (t)

In one case, however, an affidavit of merits was dispensed with entirely. An agent had effected a policy for his principal who resided abroad, and a bill was filed to restrain proceedings in an action brought upon it; to which the agent put in his answer, admitting the material facts of the bill. An injunction was moved for upon these admissions, until the answer of the other defendant should come in, and an objection was made, that there ought to have been an affidavit; the Court, however, overruled it, and granted an injunction, considering the admissions equivalent to an affidavit. (u)

A motion of this description was refused by the Court of Exchequer, in a case where costs had been taxed upon a judgment at law as in case of a nonsuit, but not paid, upon which inquiry was made of the plaintiff's attorney where the plaintiff resided, that the costs might be paid; but the attorney not only refused to satisfy the inquiry, but threatened to bring a fresh action. The Court, upon a motion for substituted service being made, said it differed from the ordinary case, as there was no action, either commenced or depending; and that as to the threat used by the plaintiff's attorney, it could not upon that circumstance alone grant the motion. (x) The Court of Exchequer have also refused to make an order for substituted service where no declaration has been delivered. (y)

It has been determined, in a late case before the Vice Chancellor, that where the assignee of a bond brings an action upon the bond in the name of the assignor (the obligee) who is abroad, and the obligor institutes a suit in equity, for the purpose of restraining such action, making the assignee and his assignor a party, the Court will make an order that service on the attorney in the action shall be good service on obligee. Consequently if he does not appear and answer the bill within the usual time, an injunction will be issued against him, to restrain the action until appearance and answer. (z) In *Montagu* v. *Hill*, (a) [*266] Lord Lyndhurst, C., expressed a *doubt whether, notwithstanding an injunction of this nature against the assignor, the assignee might not have continued the action; but, with great deference to so great an authority, it is submitted that he could not, because the common injunction is not only directed to the party himself, but to his counsellors, *attorneys* solicitors and agents, and every of them; and it is to be recollected that all assignments of a *chose in action*, in order to be effective at law, are accompanied by an appointment of the assignee to be the attorney of the assignor, &c.

The practice of ordering substituted service of process to be good service, where a defendant was abroad, appears formerly to have been permitted to a much greater extent than at present, Thus, in *Hales* v. *Sutton*, (b) where defendants, who were executors living abroad, had given a letter of attorney to a person to prove a will, service on that person was held to be good; and in *Carter* v. *De Brune*, (c) service of a *subpœna* on a person who transacted matters under a letter of attorney from the defendant, was deemed good service. (d) The authority of these cases, however, was disputed by Lord Redesdale, in

(t) Nunes v. Jaffray, 1 Fowl. Ex. Pr. 226; Wattleworth v. Pitcher, 2 Price, 189.
(u) Royal Exchange Insurance Co. v. Ward, 1 Fowl. Ex. Pr. 225.
(x) Cecil v. Reilly, ib. 226.
(y) Angerstein v. Wentworth, ib. 228.
(z) Lord Portarlington v. Graham, 5 Sim. 416.
(a) 4 Russ. 128.
(b) 1 Dick. 26.
(c) Ibid. 39.
(d) *Vide etiam*, Anon. 1 P. Wms. 523.

Smith v. *The Hibernian Mine Company*, (*e*) who refused a motion for an order that service upon a person acting under a power of attorney for a defendant should be good service; observing, that although Mr. Dickens was a very attentive and diligent registrar, yet his notes were very loose, and not considered as of very high authority, unless supported by the register books. Upon that occasion, Lord Redesdale referred to a cause argued before Lord Thurlow, under these circumstances. In a mortgage a covenant was inserted, that if the mortgagee should be desirous of filing a bill of foreclosure after a certain time, service of a *subpœna* on a person there named should be good service; and on that ground an application was made to Lord Thurlow to substitute service, the mortgagee having gone to the East Indies: but the answer of Lord Thurlow was, "I can no more try the fact whether there is such a covenant, without having the party before me, than I can decide any other facts without having the party before me." (*f*) *In another case before Lord Thurlow, (*g*) his Lordship said, that, for the purpose of an injunction [*267] bill, service upon the attorney at law has been held good service, but in no other case. In that case there were a cause and cross cause, and the plaintiffs in the original bill being many, and several of them out of the jurisdiction, and others not to be found, a motion was made that service on their clerk in court should be good service, which was refused. A motion of the same nature was made, in *Bond* v. *The Duke of Newcastle*, (*h*) and Lord Thurlow, after consulting the registrar, said it could not be done even in a cross cause, or upon a supplemental bill, for they are distinct suits, in which the attorney or clerk in court have no authority to appear; and the Court will not bring a party into contempt for non-appearance, when for want of privity he may know nothing of the order to appear. (*i*)

But although the court will not, where there are a cause and cross cause, order a *subpœna* in the cross cause to be served upon the clerk in court of the plaintiffs in the original cause, yet it will suspend the proceedings in the original cause till the plaintiffs have answered the cross bill. (*k*)

The rule laid down by Lord Thurlow, in *Anderson* v. *Lewis*, (*l*) viz: that, except in the case of an injunction bill, the Court will not compel the appearance of a party abroad, by service upon a person whom he has not appointed to appear for him, extended formerly to cases of amended bills; in which cases it has been determined that the Court will not order service upon the defendant's clerk in court in the original suit, of a *subpœna* to appear and answer the *amended* bill, to be good service upon the defendant, because an amended bill might be altogether a new suit, in which it would be very improper to force an attorney upon another without his consent. (*m*) In *Gildenechi* v. *Charnock*, (*n*) however, an order that service upon the clerk in court of a *subpœna* to answer an amended bill should be good service, appears to have been *made, [*268] but it was under very peculiar circumstances; one of which was, that the defendant, although not served with a *subpœna*, had already appeared upon two motions in the cause. Now, however, by the 20th order of the 3d April, 1828, (*o*) a *subpœna* to answer an amended bill in the Court of Chancery, may be served on the defendant's clerk in court in the original suit.

(*e*) 1 Sch. & Lef. 238.

(*f*) This, in all probability, was the case of Willings v. Loman, reported in Hind's Practice, 90.

(*g*) Anderson v. Lewis, 3 Bro. C. C. 429. (*h*) 3 Bro. C. C. 386.

(*i*) Ibid. Ed. Belt, from Lord Colchester's MSS.

(*k*) Anderson v. Lewis, *ubi sup.*; Mason v. Gardiner, 4 Bro. C. C. 478; Waterton v. Croft, 5 Sim. 502.

(*l*) *Supra*.

(*m*) Roberts v. Worsley, 2 Cox, 389.

(*n*) 6 Ves. 171.

(*o*) 2 Russ. App. 11.

The rule that a party out of the jurisdiction cannot be made amenable by means of substituted service, except in cases of injunction, applies to cases of *revivor;* and therefore, where a defendant had appeared to an original bill, and afterwards the plaintiff died, and a bill of revivor was filed by his representatives against the same defendant, who was not to be found, a motion, that service upon his clerk in court in the original cause might be deemed good service, was refused by Lord Thurlow, who said that the plaintiff must proceed under the 5 Geo. 2, c. 25, for taking the bill *pro confesso.* (*p*)

Although it is in general true that, except in injunction cases, the Court will not order substituted service to be good service upon defendants who are out of the jurisdiction, yet it seems that, in cases where the party out of the jurisdiction has appointed another to act as his agent in respect of the property which is the subject matter of the suit, and such agent has been made a party to the suit, for the purpose of serving him with an injunction to restrain his dealing with such property, the Court has permitted service of the *subpœna* upon the agent, to be considered good service upon his employer. This seems to have been the principle acted upon in the case of *Hyde* v. *Forster*, (*q*) which, although it is one of those cases in Mr. Dickens' reports which are the subject of Lord Redesdale's observations in the case of *Smith* v. *The Hibernian Mine Company*, before referred to, yet, as upon reference to the registrar's book, it appears to have been correctly reported, must be considered as excepted from the disqualifying effect of those observations. The circumstances of the case, as taken from the registrar's book, (*r*) appears to have been as follows, viz: the [*269] defendant, *Forster*, was resident *at the time of the bill filed, and continued to reside out of the jurisdiction; and the other defendant, *Myers*, by his answer, set forth, that he was a factor or agent for *Forster*, and that, by virtue of some power or authority from Forster, he had for some time been and then was in the possession or receipt of the rents and profits of chambers in Barnard's Inn, for the use of Forster, which chambers were a part of the premises in question in the cause. The motion was, that service of *subpœna*, to appear, &c., on the defendant Myers, as agent or factor for Forster, might be deemed good service; and it appears that the answer of Myers was read in support of the motion, and that, after hearing counsel on both sides, the order was made. The principle of this case appears to have been acted upon by Sir J. Leach, V. C., in *English* v. *Hendrick*, (*s*) where an order was made for the service of a *subpœna* to answer upon the proctors of the defendant, who had been employed by him to get administration to an intestate, whose property was the subject of the suit, and had also been employed by the defendant to act as his agent in receiving the amount of a bill of exchange due to the intestate.

It is true that a similar application was refused by Lord Eldon, in *Rickcord* v. *Nedriff*, (*t*) which case very much resembled, in its circumstances, that of *Hyde* v. *Forster*. The bill prayed that the assignment of an annuity by the plaintiff to the defendant *Savage*, might be declared fraudulent and void; and that the defendant Nedriff, to whom Savage, previously to his absconding from the country, had delivered the deed of assignment, and to whom he had also executed a power of attorney, to enable him to receive the arrears then due, might be ordered to deliver up the deeds, and be restrained from receiving the arrears under the power. Nedriff, by his answer, admitted the facts stated in

(*p*) Henderson v. Maggs, 3 Bro. C. C. 127.
(*q*) 1 Dick. 102.
(*r*) Reg. Lib. 1744; A. fol. 491, b.; 2 Swanst. 459, n.
(*s*) Mad. & Geld. 205. (*t*) 2 Mer. 458.

the bill, and a motion was made on the part of the plaintiff, on the admissions in Nedriff's answer, that service of the *subpœna* upon him might be deemed good service upon the other defendant, Savage. This motion was refused; but Lord Eldon, in refusing it, appears to have proceeded upon the ground that the relief sought by the bill might *have been obtained by motion against the defendant Nedriff, upon affidavit of the facts alleged, as [*270] constituting the ground for the application. (*u*)

In order to remedy the inconveniences arising from the defect of power in courts of equity, to compel the appearance of parties out of the jurisdiction of the Court, several Acts of Parliament have been passed. By the first of these, viz: the 5 Geo. 2, c. 25, (*w*) entituled, "An Act for making process in Courts of Equity effectual against persons who abscond and cannot be served therewith, or who refuse to appear," it is enacted, that if in any suit which shall be commenced in any Court of Equity, any defendant, against whom any *subpœna* or other process shall issue, shall not cause his appearance to be entered upon such process, within such time and in such manner as, according to the rules of the Court, the same ought to have been entered in case such process had been duly served, and an affidavit or affidavits shall be made to the satisfaction of such Court, that such defendant is beyond the seas, or that upon inquiry at his or her usual place of abode he could not be found, so as to be served with such process, and that there is just ground to believe that such defendant is gone out of the realm, or otherwise absconded to avoid being served with the process of such Court, then and in such case the Court out of which such process issued, may make an order directing and appointing such defendant to appear, at a certain day therein to be named, and a copy of such order shall, within fourteen days after such order made, be inserted in the London Gazette, and published on some Lord's day, immediately after Divine service, in the parish church of the parish where such defendant made his usual abode, within thirty days next before such his absenting; and also a copy of such order shall, within the time aforesaid, be posted up as after mentioned; (that is to say) a copy of every such order made in His Majesty's High *Court of Chancery, Court of Exchequer, or the Court of the Duchy Cham- [*271] ber of Lancaster at Westminster, shall be posted up in some public place at the Royal Exchange in London; and a copy of every such order made in any of the Courts of Equity of the counties palatine of Chester, Lancaster and Durham, or of the Great Sessions in Wales, shall be posted up at some public place in some market town within the jurisdiction of the Court by which such order was made, and nearest to the place where such defendant made his usual abode as aforesaid, such place of abode being also within the jurisdiction of the said Court; and if the defendant do not appear within the time limited by such order, or within such further time as the Court shall appoint, then, on proof made of such publication of such order as aforesaid, the Court being satisfied of the truth thereof, may order the plaintiff's bill to be taken *pro confesso*, and make such decree thereupon as shall be thought just; and may thereupon issue process to compel the performance of such decree, either by an immediate

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(*u*) By the 4 & 5 Will. 4, c. 83, the Court may order service upon the receiver, steward, or other person receiving the rents, &c. of the property in question for a defendant who is abroad, to be good service. *Vide post.* 281.

(*w*) Repealed by 11 Geo. 4, and 1 Will. 4, c. 36, in which the following clauses are re-enacted.

sequestration of the real and personal estate and effects of the party so absenting (if any such can be found,) or such part thereof as may be sufficient to satisfy the demands of the plaintiff in the said suit, or by causing possession of the estate or effects demanded by the bill to be delivered to the plaintiff, or otherwise as the nature of the case shall require; and the said Court may likewise order such plaintiff to be paid and satisfied his demands out of the estate or effects so sequestered, according to the true intent and meaning of such decree, such plaintiff first giving sufficient security, in such sum as the Court shall think proper, to abide such order touching the restitution of such estate or effects, as the Court shall think proper to make concerning the same, upon the defendant's appearance to defend such suit, and paying such costs to the plaintiff as the Court shall order; but in case such plaintiff shall refuse or neglect to give such security as aforesaid, then the said Court shall order the estate or effects so sequestered, or whereof possession shall be decreed to be delivered, to remain under the direction of the Court, either by appointing a receiver thereof or otherwise, as to such Court shall seem meet, until the appearance [*272] of the defendant to defend such suit, and paying such *costs to the plaintiff as the said Court shall think reasonable, or until such order shall be made therein as the Court shall think just.

By the 4th section of the same Act it is provided, that if any decree shall be made in pursuance of this Act, against any person being out of the realm or absconding in manner aforesaid, at the time such decree is pronounced, and such person shall within seven years after the making such decree return or become publicly visible, then and in such case he shall likewise be served with a copy of such decree, within a reasonable time after his return or public appearance shall be known to the plaintiff; and in case any defendant against whom such decree shall be made, shall within seven years after the making such decree happen to die before his or her return into this realm, or appearing openly as aforesaid, or shall within the time last before mentioned die in custody before his or her being served with a copy of such decree, then his or her heir, if such defendant shall have any real estate sequestered, or whereof possession shall have been delivered to the plaintiff, and such heir may be found, or if such heir shall be a *feme covert*, infant or *non compos mentis*, the husband, guardian or committee of such heir respectively; or if the personal estate of such defendant be sequestered, or possession thereof delivered to the plaintiff or plaintiffs, then his or her executor or administrator (if any such there be) may and shall be served with a copy of such decree within a reasonable time after it shall be known to the plaintiff that the defendant is dead, and who is his or her heir, executor or administrator, or where he, she or they respectively may be served therewith.

The 5th section contains a proviso, that if any person or persons, so served with a copy of such decree, shall not, within six months after such service, appear and petition to have the said cause re-heard, such decree so made as aforesaid shall stand absolutely confirmed against the person and persons so served with a copy thereof, his, her and their respective heirs, executors and administrators, and all persons claiming or to claim by, from or under him, her, them or any of them, by virtue of any act done or to be done subsequent to the commencement of such suit.

[*273] *The 6th section provides, that if any person, so served with a copy of such decree, shall, within six months after such service, or if any person, not being so served, shall within seven years next after the making such decree, appear in Court and petition to be heard with respect to the matter of such decree, and shall pay down or give security for payment of such costs as the Court shall think reasonable in that behalf, the person or persons so petitioning, his, her or their respective representatives, or any person

or persons claiming under him, her or them respectively, by virtue of any act done before the commencement of the suit, may be admitted to answer the bill exhibited, and issue may be joined and witnesses on both sides examined, and such other proceedings, decree and execution may be had thereon as there might have been in case the same party had originally appeared and the proceedings had then been newly begun, or as if no former decree or proceedings had been in the same cause.

By the 7th section it is provided, that if any person or persons against whom such decree shall be made, his, her or their heirs, executors or administrators, shall not, within seven years next after the making of such decree, appear and petition to have the cause re-heard, and pay down or give security for payment of such costs as the Court shall think reasonable in that behalf, such decree, made as aforesaid, shall stand absolutely confirmed against the person and persons against whom such decree shall be made, his, her and their heirs, executors and administrators, and against all persons claiming or to claim by, from or under him, her, them or any of them, by virtue of any act done or to be done subsequent to the commencement of such suit, and at the end of such seven years it shall and may be lawful for the Court to make such further order as shall be just and reasonable, according to the circumstances of the case; and it is provided, that this act shall not extend or be construed to extend to warrant or make good any proceeding against any person beyond the seas, unless it shall appear to the satisfaction of the Court, by affidavit or affidavits before the making of such decree, that such person had been in that part of Great Britain called England within two years next before the *subpœna* in such suit issued against such person, *nor to warrant or make good any proceeding against any person in any Court of Equity having a limited [*274] jurisdiction, unless it shall appear to the satisfaction of such Court, by affidavit or affidavits before the making of such decree, that such person had resided within the jurisdiction of such Court within one year next before the *subpœna* in such suit issued against such person.

The whole of the above Act was repealed by the 11 Geo. 4, and 1 Will. 4, c. 36; but as the above clauses were re-enacted by the same statute, the following decisions upon the 5 Geo. 2, c. 25, are still important, as bearing upon the construction of the last Act.

In *Burton* v. *Mattons*, (*u*) Lord Hardwicke expressed his opinion to be, that if the minister of the parish in which, under the 5 Geo. 2, c. 25, the copy of the order directing the defendant to appear is directed to be published, prevents its being so published, as the Act itself is silent and does not mention any penalty for his disobedience, such minister is indictable for the contempt of the order of the Court.

It was also the opinion of Lord Hardwicke, upon the above statute, that it was not sufficient to make an affidavit that the party making it was informed and believed that the defendants withdrew themselves into Ireland to avoid being served with the process of this Court, but that it must be set forth from whom the party deposing received such information. (*x*)

It has also been held, that in proceeding to take a bill *pro confesso* against an absconding party, the mode prescribed by the Act must be strictly complied with, and therefore, when an application was made to take the bill *pro confesso*, upon the certificate of the serjeant-at-arms that the defendant had absconded, and had so secreted himself that he could not be found; but without the affidavit, required by the statute, of the defendant's absconding in foreign parts to avoid the process of the Court, Lord Thurlow refused the motion. (*y*)

(*u*) 2 Atk. 114; 1 Barn. 401, S. C.
(*x*) Burton v. Mattons, 1 Barn. 401.
(*y*) Short v. Downer, 2 Cox, 84.

Although the 8th section of the Act requires an affidavit that the defendant had been in the kingdom within two years before the *subpœna* had issued, yet [*275] where that was not the case, the *fact being that the defendant had been outlawed, Lord Loughborough, upon the authority of two manuscript cases before Lord Camden (z) and Lord Thurlow, (a) which were cited, ordered a bill to be taken *pro confesso* under the statute, upon an affidavit merely stating that the defendant continued abroad to avoid process. (b) It is to be observed, however, that the case, which appears to have been cited before Lord Loughborough as having occurred before Lord Camden, was that of *Mason* v. *Polier*, (c) where the defendant had gone abroad above two years before the filing of the bill, and had settled in Spain, where he continued to reside. The motion was made upon an affidavit by the plaintiff stating that fact, and that he believed the defendant *continued to reside abroad to elude justice;* and Lord Camden, in making the order, said he had very great doubts on the Act, as it was very penal against the parties: "the grounds are, that the defendant is either gone abroad or absconds to avoid being served; the defendant certainly does not abscond, because he is visible; it cannot be said that he went abroad to avoid being served, for the plaintiff states, the defendant went abroad above two years before the plaintiff thought of filing the bill; and by the Act of Parliament, the defendant is to have been in the kingdom within two years preceding the filing of the bill. But the plaintiff swears he believes the defendant continues abroad to elude justice: the affidavit to be made under the Act, is to be to the satisfaction of the Court; if it be, the Court may make the order." To this case a *query* is added by the reporter, as to whether this decision is warranted by the Act. He then refers to a similar order made by Sir Lloyd Kenyon, M. R., 29 June, 1786, and adds, "but these cases have been since exploded;" (d) and in a subsequent case, (e) Lord Alvanley, M. R., said he never would conform to the case of *Clarke* v. *Wright*, and that he never would make an order upon this Act of Parliament, without a positive affidavit of the defendant's having been in England within the two years. (f)

[*276] *It appears that some doubts were formerly entertained, whether this statute applied only to cases where the defendant had never been served at all, or whether it applied to cases where the defendant had been served with a *subpœna*, but afterwards absconded to avoid the subsequent process; but in *Mawer* v. *Mawer*, (g) Lord Thurlow was of opinion that it extended to every case where the party had avoided any part of the process whatever, though he might have been served with a *subpœna*, &c. Upon this principle it was held, that although a defendant had appeared and answered the original bill, yet if he could not be found so as to be served with a *subpœna* to answer to a bill of revivor, the plaintiff might proceed under the 5 Geo. 2, c. 25, to have the bill of revivor taken *pro confesso*. (h)

The method to be pursued in taking a bill *pro confesso* against a defendant absconding and going beyond seas, under the 11 Geo. 4, and 1 Will. 4, c. 36, is detailed in the case of *Baker* v. *Keen;* (i) and it appears from the case of *Turner* v. *Turner*, (k) that even when the absconding defendant is the only

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(z) *Vide* Mason v. Polier, *post*.
(a) Gascoyne v. Kitchnam, June 29, 1788.
(b) Clarke v. Wright, reported as Anon. 2 Ves. jun. 188.
(c) 1 Dick. 401. (d) 1 Dick. 403, n.
(e) Neale v. Morris, 5 Ves. 1.
(f) *Vide* Bishop of Winchester v. Bourn, ib. 113.
(g) 1 Cox, 104; 1 Bro. C. C. 388.
(h) Henderson v. Meggs, 2 Bro. C. C. 127; James v. Dore, 1 Dick. 63.
(i) 4 Sim. 498. (k) Ibid. 497.

defendant, a decree for taking the bill *pro confesso* under such circumstances cannot be had upon motion, but the cause must be set down for hearing.

The course of proceeding, as stated in *Baker* v. *Keen*, was as follows. The bill was filed on the 29th of October, 1832; on the 24th of January, 1833, the plaintiff's counsel obtained an order on motion, (supported by affidavit that the defendant had absconded and gone beyond the seas,) that the defendant should appear to the bill on or before the 1st of March then next. On the 7th of March, 1833, it appearing, by production of the London Gazette, that a copy of the order for the defendant to appear had been inserted therein, and, by affidavit, that the order had been published in the defendant's parish church, and that a copy of it had been posted at the Royal Exchange, according to the directions of the Act, but that the defendant had not appeared; an order was made, on motion, that the plaintiff's clerk in court should attend at the *hearing of the cause with the record of the bill, in order to [*277] have the same taken *pro confesso* against the defendant. The cause having been set down for hearing, it was ordered, on the 23d of March, 1833, on motion, to be placed at the head of the paper of causes for the 27th of that month, and that the plaintiff's clerk in court should then attend with the record. Accordingly, on that day, the clerk in court attended, and a decree *pro confesso* was taken.

By a recent Act of Parliament, (*l*) passed for the purpose of "remedying the inconvenience and delays of justice, arising from the defect of jurisdiction in Courts of Equity to effectuate the service of their process in such parts of the United Kingdom of Great Britain and Ireland as are not within the jurisdiction of such Courts respectively," it has been enacted, that it shall and may be lawful for the Courts of Chancery and of Exchequer in England respectively, if they shall so think fit, upon special motion of the complainant or complainants in any suit which has been or shall be instituted in such Courts respectively, concerning lands, or tenements or hereditaments, situate or being within that part of the United Kingdom called England or Wales, to order and direct that service in any part of the United Kingdom of Great Britain and Ireland, and in the Isle of Man respectively, of any *subpœna* or *subpœnas*, letter missive or letters missive, and of all subsequent process to be had thereon, upon any defendant or defendants in such suit then residing in such part of the said United Kingdom or Isle of Man, in which he, she or they shall be so served, shall be deemed good service of, or be made upon such defendant or defendants, upon such terms and in such manner and at such time as to such Courts respectively shall seem reasonable; and that thereupon it shall and may be lawful for such Courts respectively to proceed upon such service so made as aforesaid, as fully and as effectually as if the same had been duly made within the jurisdictions of such Courts respectively.

*By the second section of the above Act, the same powers are [*278] given to the Courts of Chancery and Exchequer of Ireland in suits concerning lands, tenements and hereditaments in Ireland, to direct process to be served in other parts of the United Kingdom and Isle of Man; and by the third section it is provided, that along with such *subpœna* or letter missive served under any such order as aforesaid of the said Courts of Chancery and of Exchequer of England and of Ireland respectively, a copy of the prayer of such complainant's bill shall be served upon every such defendant, and that no

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(*l*) 2 Will. 4, c. 33.

process of contempt shall be entered upon any such proceedings as hereinbefore mentioned, nor any decree made absolute in any of the said Courts in England or Ireland respectively, without the special order of such Court upon special motion made for such purpose, and that nothing in the said Act should be held to make it compulsory upon the complainant or complainants in any suit in any of the said respective Courts to serve with process, or bring before such Courts respectively, any party or parties, person or persons, further or otherwise than such complainant or complainants are now by law or the practice of such Courts respectively required to do.

Shortly after the passing of the above Act, the Vice Chancellor (Sir L. Shadwell) made an order upon special motion, that service of a *subpœna*, together with a copy of the prayer of the bill, upon defendants, in the county of Wigton, in *Scotland*, should be good service, in a case where the object of the bill was to carry into effect the trusts of a will relative to certain real estates in the borough of Southwark. Upon being served with process pursuant to that order, the defendants appeared, and took out two orders for time to put in their answer, and upon their failure to do which, an application was made to the Vice Chancellor for an order, that an attachment might issue under the writ of the sheriff of Wigtonshire, or other proper officer in Scotland, against the defendant; but as the question involved the framing of a new form of order, his Honor directed the matter to be brought on before the head of the Court; at the same time expressing himself, as he had done previously upon granting [*279] the *subpœna*, to be clearly of opinion, that the Act *must be construed as extending to Scotland. Lord Brougham, however, upon the motion being made before him, said, that although the words of the Act were certainly large and comprehensive, he entertained no doubt whatever the statute had never been intended or supposed to apply to *North Britain*. His Lordship said, that the measure had been submitted to Parliament on the suggestion of Lord Plunkett, whose object was to make the process of the respective Courts of Equity in England and Ireland more interchangeably, in all cases where lands the subject of the suit were situated in the one country, and the defendants sought to be affected by it resided in the other; and that if the statute were to be construed in the manner contended for, it would amount to a virtual repeal of one of the articles of the Union, although Scotland was never once mentioned by name in any part of the Act. Under these circumstances, his Lordship availed himself of the discretionary power vested in the Court by the words "if they shall so think fit," to decline making the order; (*m*) but in a subsequent case, (*n*) Lord Lyndhurst (Chancellor) said, that he was of opinion, that what Lord Plunkett intended was, for the purpose of construing the Act, inconclusive, and that the Act extended to Scotland, and that he had so held in a late case in the Court of Exchequer, where a similar application was made.

A similar order to that in *M'Master* v. *Lomax* was subsequently made by the Vice Chancellor, in a case of *Parker* v. *Lloyd*, (*o*) where one of the defendants resided in Edinburgh. It is to be observed, that in cases of this description, it is necessary that some time should be named in the order within which the *subpœna* must be served.

By the above Act the relief was confined to suits concerning lands, tenements or hereditaments, in England, or Wales or Ireland respectively; and that the service of process under the Act was limited to any part of Great Britain or Ireland, or the Isle of Man; but by a subsequent Act of Parliament, (*p*) the

(*m*) M'Master v. Lomax, 2 Mylne & Keen, 32.
(*n*) Cameron v. Cameron, ib. 289. (*o*) 5 Sim. 508.
(*p*) 4 & 5 Will. 4, c. 82.

Act of 2 Will. 4, c. 33, has been extended to all suits instituted *in the Courts of Chancery and Exchequer of England or Ireland respectively, concerning any *lien*, *judgment* or *incumbrance*, upon any lands, tenements or hereditaments, situate in England or Wales or Ireland respectively, or concerning any money vested in any Government or other public stock, or public shares in public companies or concerns, or concerning the dividends or produce thereof. [*280]

It has also been enacted by the same statute, that the provisions in the said Act, authorizing the said Courts respectively to direct that the service in any part of the United Kingdom of Great Britain or Ireland, or the Isle of Man respectively, of any *subpœna* or *subpœnas*, letter missive or letters missive, and of all subsequent process to be had thereon, upon any defendant or defendants in such suit then residing in such parts of the United Kingdom or the Isle of Man in which he, she or they shall be so served, shall be deemed good service upon such defendant or defendants, &c., shall be and they are thereby extended to any defendant or defendants in any such suit or suits as thereinbefore mentioned, who shall appear by affidavit to be resident in any place, specifying the same, out of the United Kingdom of Great Britain and Ireland; and that it shall and may be lawful for the said Courts respectively, on motion in open Court of any of the complainants in any such suit, founded upon an affidavit or affidavits, and such other documents as may be applicable, for the purpose of ascertaining the residence of the party, and the particulars material to identify such party and his residence; and also specifying the means whereby such service may be authenticated, and especially, whether there are any British officers, civil or military, appointed by or serving under His Majesty, residing at or near such place, to order that service of a *subpœna* to appear and answer upon the party, in the manner thereby directed, or in case where the said Courts respectively shall deem fit, upon the receiver, steward or other person receiving or remitting the rents of the lands or premises, if any, in the suit mentioned, returnable at such time as the said Courts respectively shall direct, shall be deemed good service of such party; and afterwards, upon an affidavit of such service had, to order an appearance to be *entered for such party, in such manner, and at such time, as the said Courts respectively shall direct; and that thereupon it shall and may be lawful for such Courts respectively to proceed upon such service so made as aforesaid, as fully and effectually as if the same had been duly made within the jurisdictions of such Courts respectively. [*281]

The second section of the above Act provides, that in cases were the defendant cannot be found, and there is just ground for believing that he secretes and withdraws himself so as to avoid being served with process of the Court; it shall be lawful for the Court to order that the service of the *subpœna* to appear and answer shall be substituted in such manner as the Court shall think reasonable, and direct by any such order.

Under the last-mentioned Act an application was made to the Vice Chancellor, in a cause of *Parker* v. *Lloyd*, (*q*) for an order, directing the British consul at Naples to serve process of *subpœna* on the defendant Lloyd, who was resident in that city; and his Honor made an order, that the *subpœna* should issue, but declined giving any special directions as to the person by whom, or the manner in which the *subpœna* should be served.

It is to be observed, that under this Act a power is given to the Court, in case the party subpœnaed does not appear, to order an appearance to be entered for him upon affidavit of service, a power which is not given by the first Act, (*r*) which, however, authorizes the Court to proceed upon service made in pursu-

(*q*) 2 Mylne & K. 290, n. (*r*) 2 Will. 4, c. 33.

ance of that Act, as fully and effectually as if the same had been made within its jurisdiction; it is presumed, therefore, that were the party is served with a *subpœna* under the first-mentioned Act, as resident in any part of the United Kingdom out of the jurisdiction of the Courts at Westminster, or in the Isle of Man, and does not appear according to the terms of the order under which he is served, the next process against him must be an attachment, &c., according to the ordinary practice, but directed to the proper authority of the country in which he resides; but that where he is served under the second Act, as residing [*282] abroad, and does not appear *in pursuance of the order, in that case the Court may order an appearance to be entered for him, so that, when such appearance has been entered, the plaintiff may proceed to have the bill taken *pro confesso* against the defendant in the usual way.

It should be mentioned here, that by an Act passed in the 41 Geo. 3, c. 90, intituled an Act for the more speedy and effectual recovery of debts due to his Majesty, his heirs and successors, in right of his Imperial Crown of this realm, and for the better administration of justice within the same, it is enacted, that in cases where in any suit between party and party, or in any matter or proceeding by petition, in cases of minors, bankrupts, idiots or lunatics, any decree shall be pronounced or any order made for payment, or for accounting for money by the high Court of Chancery in that part of the United Kingdom called England, the Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the Great Seal of England for the time being respectively, shall, upon application made to him or them respectively, cause a copy of such order or decree to be exemplified and certified to the Court of Chancery in that part of the United Kingdom called Ireland, under the Great Seal of England; and the Lord Chancellor, Lord Keeper or Lords Commissioners for the Custody of the Great Seal of Ireland shall forthwith cause such order or decree, when it shall be presented to them respectively so exemplified, to be inrolled in the rolls of the high Court of Chancery in Ireland, and shall cause process of attachment and committal to issue against the person of the party against whom such order or decree shall have been made respectively, in order to enforce obedience to and performance of the same, as fully and effectually to all intents and purposes as if such order or decree had been originally pronounced in the said Court of Chancery in Ireland; and it shall and may be lawful to and for the Lord Chancellor, Lord Keeper or Lords Commissioners of the Great Seal of Ireland for the time being, from time to time to make orders upon petition as the occasion may require, for payment of money levied under such process as aforesaid into the Bank of Ireland, with the privity of the Accountant General [*283] of the said Court, to the credit and for the *benefit of the party who shall have obtained such order or decree; and the Governor and Company of the Bank of Ireland are hereby authorized and required to receive and hold all such moneys, subject to the orders of the said Court of Chancery; provided always, that no such moneys shall be charged with or subject to poundage for the usher of the said Court of Chancery in Ireland, when the same shall be paid out by order of the said Court.

By the sixth section of the same Act, similar power is given to the Court of Chancery in England to enforce obedience to process of the Court of Chancery in Ireland; and the seventh and eighth sections give reciprocal powers of the same to the Courts of Exchequer in England and Ireland to enforce the process of those Courts respectively.

*CHAPTER V. [*284]

OF PARTIES TO A SUIT.

SECT. I.—*Of necessary Parties in respect of the Concurrence of their Interests with that of Plaintiff.*

IT is the constant aim of a Court of Equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the Court perfectly safe to those who are compelled to obey it, and to prevent future litigation. (*a*) For this purpose, all persons materially interested in the subject ought generally to be parties to the suit, either as plaintiffs or defendants, however numerous they may be.

In pointing out the application of this rule, I shall consider it *first*, first with reference to those whose rights are concurrent with those of the party instituting the suit; and *secondly*, with reference to those who are interested in resisting the plaintiff's claim.

With respect to the first class, it is to be observed, that it is required in all cases where a party comes to a Court of Equity to seek for that relief which the principles there acted upon entitle him to receive, that he should bring before the Court all such parties as are necessary to enable it to do complete justice, and to render the performance of the decree which he seeks perfectly safe to the party called upon to perform it, so as to prevent his being sued or molested again respecting the same matter either at law or in equity. [*285] For *this purpose, he must take care to have before the Court, either as co-plaintiff with himself, or as defendants, all such persons, who are so circumstanced, that unless their rights be bound by the decree of the Court, they might cause future molestation or inconvenience to the party against whom the relief is sought.

Upon this principle, in suits to establish a will relating to real estates, all persons claiming an interest under such will (subject to the rules which will be presently pointed out with regard to those who claim in remainder after the first estate of inheritance) (*b*) must be parties.

Upon the same principle, it is in most cases considered necessary, where a plaintiff has only an equitable right in the thing demanded, that the person having the legal right to demand it, should be a party to the suit; for, if he were not, his legal right would not be bound by decree, (*c*) and he might, notwithstanding the success of the plaintiff, have it in his power to annoy the defendant by instituting proceedings to assert his right in an action of law, to which the decree in equity being *rem inter alios actam* would be no answer, and the defendant would be obliged to resort to another proceeding in a Court

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(*a*) Lord Red. 133.
(*b*) *Post*, p. 317.
(*c*) Lord Red. 145.

of Equity, to restrain the plaintiff at law from proceedings to enforce a demand which has been already satisfied under the decree in equity. This complication of litigation, it is against the principles of equity to permit, and it therefore requires that in every suit all the persons who have legal rights in the subject in dispute, as well as the persons having the equitable right, should be made parties to the proceedings.

Upon this ground it is, that in all suits by persons claiming under a trust, the trustee or other person in whom the legal estate is vested, is required to be a party to the proceeding. Thus, where an estate had been limited by a marriage settlement to a trustee and his heirs, upon trust during the lives of the plaintiff and his wife, to apply the profits to their use, with remainder to the children of the marriage, with remainders over; and a bill was brought by the persons interested under that settlement to set aside a former settlement, as [*286] obtained *by fraud, it was held that the plaintiff could have no decree because the trustee was not a party; (c) and where it appeared that a mortgage had been made to a trustee for the plaintiff, it was determined that the trustee was a necessary party to a suit to foreclose the equity of redemption. (d)

The rule is the same whether the trust be expressed or only implied, as where the executor of a mortgagee files a bill to foreclose a mortgage of freehold or copyhold estate, he should make the heir at law of the mortgagee a party, (e) because although according to the principles upon which Courts of Equity proceed, money secured by mortgage is considered as part of the personal estate of the mortgagee, and belongs on his death to his personal representative; yet, as the legal estate is in the heir, he would not, unless he was before the Court when it was pronounced, be bound by the decree. There is another reason why it is necessary to bring the heir before the Court in a bill to foreclose a mortgage, because if the mortgagee should think proper to redeem the estate under the decree, he will be a necessary party to the re-conveyance. (f) And so important is it considered in such a case that the heir should be a party, that where a mortgagee died without any heir that could be discovered, the Court restrained his executor from proceeding at law to compel payment of the mortgage money, and ordered the money into Court till the heir could be found. (g)

The heir, however, is only a necessary party where nothing has been done by the mortgagee to affect the descent of the legal estate upon him. If the descent of the legal estate has been diverted, it is necessary to have before the Court the person in whom it is actually vested; and therefore, where a mortgagee has devised his mortgage in such manner as to pass not only the money secured, but the legal estate in the property mortgaged, the devisee alone may [*287] foreclose *without making the heir-at-law of the original mortgagee a party. (h)

Upon the same principle, where a mortgagee in his life-time actually assigns his whole interest in the mortgage, even though the assignment be made without the privity of the mortgagor, the assignee alone may foreclose without bringing the original mortgagee before the Court; (i) and where there have been several

(c) 9 Mod. 80.
(d) Wood v. Williams, 4 Mad. 186.
(e) Scott v. Nicholl, 3 Russ 476.
(f) Wood v. Williams, 4 Mad. 186.
(g) Schoole v. Sall, 1 Sch. & Lef. 177. The result of this case was, that after the cause had remained some years in Court, it was thought worth while to get an Act of Parliament to revest the estate, on an allegation that the heir could not be found. *Vide etiam*, Stokoe v. Robson, 19 Ves. 385; 3 V. & B. 54; Smith v. Richnell, ibid. *notis*; Schelmardine v. Harrop, 6 Mad. 39.
(h) Williams v. Day, 2 Cha. Ca. 32; Renvoise v. Cooper, Mad. & Geld. 371.
(i) Chambers v. Goldwin, 9 Ves. 269.

mesne assignments of the mortgage, the last assignee, provided the legal estate is vested in him, will be sufficient without its being necessary to bring the intermediate ones before the Court. (*k*) It is to be observed, however, that in order to justify the omission of the intermediate assignees in the case of an assignment of a mortgage, the conveyance must have been absolute, and not by way of mortgage; for if there be several derivative mortgagees, they must all be made parties to a bill of foreclosure by one of them. Thus, where A. made a mortgage for a term of years for securing 350*l.* and interest to B., who had assigned the term to C., redeemable by himself on paying 300*l.* and interest; and B. died, and C. brought a bill against A. to foreclose him without making the representatives of B. the original mortgagee parties, it was held by the Court that there was plainly a want of proper parties. (*l*)

The principle that requires a trustee or other owner of the legal estate to be brought before the Court in suits relating to trust property, applies equally to all cases where the legal right to sue for the thing demanded is outstanding in a different party from the one claiming the beneficial interest. Thus, where a bill is filed for the specific performance of a covenant under hand and seal of one, for the benefit of another, the covenantee must be a party to a bill by the person for whose benefit the covenant was intended, against the covenantor. (*m*) And so in *Cope* v. *Parry*, (*n*) which was a bill filed for the specific performance of a covenant for the surrender of a copyhold estate to A., in trust for others. The Lord Chief Baron (Richards) said, that as [*288] the effect of a surrender, if the Court decreed it, would be to give the legal estate to A., he ought to be a party, otherwise another suit might become necessary against him.

The principle upon which Courts of Equity act in cases of this description, is illustrated by a decision of the Court of C. B., in the case of *Rolls* v. *Yate*. (*o*) In that case, A. by indenture had covenanted with B. and C., that he A. would enter into a bond to pay B. a sum of money on a certain day. B. died, and his administrator brought an action of covenant against A. for the money, and it was adjudged that it did not lie, for although the money was to be paid to B. who was dead, yet as the covenant was to B. and C. jointly, C. who survived, being the party to the indenture, ought to have sued. Now, supposing that instead of bringing an action of covenant on the indenture, B.'s representative, who was the party entitled to the money, had filed a bill in Equity against A. for the payment, and had obtained a decree, it is clear that such a decree would not have protected A. against C.'s right to bring an action on the covenant, for a decree in equity for A. to pay a sum of money to B.'s representatives never could have been made use of in answer to an action brought against A. by C. as surviving covenantee in a covenant to B. and C. (*p*) The rule of pleading at law in cases of breaches of covenant, appears to be that performance of a covenant must be pleaded in the terms of the covenant, (*q*) and the evidence to support such plea must be confined to those points which are put in issue under it; (*r*) so that in the case above put, an action by C. against A. for non-performance of the covenant could not have been answered by showing payment of the money to the representative of B. A. must, therefore, in order to have protected himself against the action of C., have filed another bill in Equity

(*k*) Ibid.
(*l*) Hobart v. Abbot, 2 P. Wms. 643.
(*m*) Cooke v. Cooke, 2 Vern. 36; 2 Ex. Ca. Ab. 73.
(*n*) 2 J. & W. 538.
(*o*) Yelv. 177; 1 Bulstrode, 25, b. S. C.
(*p*) 1 Inst. 292, b.
(*q*) Scudamore v. Stratton, 1 Bos. & Pull. 455.
(*r*) Littler v. Holland, 3 T. R. 590.

[*289] against him, to which B.'s *representatives must have been a party, in order to obtain an injunction to restrain him from proceeding in the action.

It is to be observed that the preceding cases arose upon covenants formally entered into under hand and seal; the same rule will not however apply to less formal instruments, such as ordinary agreements not under seal, where one party contracts as agent for the benefit of another. In such cases, it is not necessary to bring the agent before the Court, because even at law, it is the undoubted right of the principal to interpose and supersede the right of his agent by claiming to have the contract performed to himself, although made in the name of his agent. This principle was acted upon by the Court of King's Bench, in the case of the *Duke of Norfolk* v. *Worthey*, (s) and in *Bethune* v. *Farebrother*, (t) where the plaintiff not wishing to appear as purchaser, procured J. S. to bargain for him, who signed the contract (not as agent) and paid the deposit by his own cheque; yet, inasmuch as it was the plaintiff's money, he was allowed to maintain an action for it without showing any disclaimer by J. S. Upon the same principle, in equity, if the plaintiff had filed a bill against the vendor, for a specific performance, he would not have been under the necessity of making J. S. a party to the suit, because, if he had succeeded in his object, performance of the contract to the plaintiff might have been shown in answer to an action at law by J. S., whose title was merely that of agent to the plaintiff. It is, however, frequently the practice to join the auctioneer as co-plaintiff with the vendor in suits for specific performance of contracts entered into at auctions, but that is because he has an interest in the contract, and may maintain an action upon it. He has also an interest in being protected against the legal liability which he may have incurred in an action by the purchaser to recover the deposit.

It is to be observed, that in order to enable the plaintiff to dispense with the necessity for making the agent entering into a contract for his employer, in his own name, a party to a suit to enforce such contract, he must state in his bill, and be in a situation to show by evidence, that he was actually an agent in the [*290] transaction, as appears to have been *done in the case of *Bethune* v. *Farebrother*, (u) by proving that although the money was paid by the cheque of the agent, it was in fact the money of the purchaser. The fact of the person contracting being the agent of the plaintiff may likewise appear from the contract itself; but if it does not appear from the contract itself, and the plaintiff is not in a situation to show the agency, by proving that the money was his own, or some act tantamount, he must make the agent a party either as co-plaintiff with himself or as a defendant, in order to bind his interest, for otherwise such agent would have a right to sue either in equity for a specific performance of the same contract, or to bring an action at law for the recovery of the money paid to the defendant; and parol evidence on the part of the defendant would in either case be inadmissible to show, in opposition to the written contract, that the purchase was made on behalf of another. (w) The same rule will apply if the agent contracted as well on his own behalf as in the capacity of agent for another. In that event the bill must be filed in his own name, and in that of the person on whose behalf he acted, or at least such person must be a party to the suit; and upon this principle, in *Small* v. *Attwood*, (x) where a contract was entered into for the purchase of an estate by

(s) 1 Camp, N. P. c. 337.
(t) Cited 5 M. & S. 385.
(u) *Ubi supra.*
(w) Bartlett v. Pickersgill, 1 Cox, 15, 1 Eden, 515.
(x) 1 Young, 407.

certain persons in their own names, but in fact on their own account, and also as agents for other parties, a bill to rescind the contract was filed in the names both of the agents, and of the other parties for whom they contracted.

With respect to the effect of a sub-contract in rendering it necessary to bring the party concerned in it before the Court in a litigation between the original contracting parties, the following distinction has been made, viz: if A. contracts with B. to convey to him an estate, and B. afterwards contracts with C., that he, B., will convey to him the same estate, in that case C. is not a necessary party to a suit between A. and B. for a specific performance; but if the contract entered into by B. with C. had been, not that he, B. should convey the estate, but that A. the original vendor should convey it to C., then C. [*291] *would have been a necessary party to a suit by B. against A. for a specific performance. (y)

Upon the principle above stated, it is presumed, that where a man enters into a contract which is expressed in the instrument itself to have been entered into by him as agent for another, he would not afterwards be allowed to sue for a performance of that contract on his own behalf, on the allegation that he was not authorized to act as agent, without bringing the party, on whose behalf it was expressed to be made, before the Court. At law it has been held, that a plaintiff under such circumstances could maintain an action, by procuring from the party on whose behalf he appeared to have entertained the contract, a renunciation of his interest. (z)

It is to be observed here, that although an agent entering into a contract in his own name, may be joined in a suit as co-plaintiff with his principal, as in the case before referred to of an auctioneer, who is frequently joined with the vendor in a bill against a purchaser, because he has an interest in the contract, or may bring an action upon it, it is merely on the ground of the interest which he has in the contract, and that the rule is indisputable, that wherever an agent has no interest whatever in the property in litigation, or in the contract, and cannot be sued either at law or in equity respecting it, in such case he ought not to be made a party; and that if he is made a co-plaintiff in the suit, a demurrer upon that ground will be allowed. (a) Upon this principle it has been held in the Court of Chancery, that an agent who bids at an auction for an estate, and signs the memorandum in his own name, need not be made a co-defendant with his employer in a bill for a specific performance of such agreement. (b)

Where the subject-matter in litigation is a *chose in action* which has been the subject of assignment, the assignor, or if dead, his personal [*292] representative, should be a party; for as an *assignment of a *chose in action* is not recognized in a court of law, and is only considered good in equity, the recovery in equity by the assignee would be no answer to an action at law by the assignor, in whom the *legal* right to sue still remains, and who might exercise it to the prejudice of the party liable; in which case the party liable would be driven to the circuitous process of filing another bill against the plaintiff at law, for the purpose of restraining his proceedings.

Upon this ground, where an obligee had assigned over a bond, and died, and the assignee sued for it in equity, the cause was directed to stand over to make the personal representative of the obligee a party; (c) and in another case, (d)

(y) ——— v. Walford, 4 Russ. 372. (z) Bickerton v. Burrell, 5 M. & S. 383.

(a) King of Spain v. Machado, 4 Russell, 228; *vide etiam*, Cuff v. Platell, ib. 242, and Makepeace v. Haythorne, ib. 244.

(b) Kingsley v. Young, Rolls, July 30, 1807, Coo. Eq. Pl. 42. *Vide etiam*, Lissett v. Reave, 2 Atk. 394; Newman v. Godfrey, 2 Bro. C. C. 332, cited, Lord Red. 130.

(c) Brace v. Harrington, 2 Atk. 235. (d) Ray v. Fenwick, 3 Bro. C. C. 25.

where the assignor of a bond was dead, and there was not a representative, it was held, on a bill filed by the assignee against the obligor for a *ne exeat*, that there was a want of parties. And in like manner, where a bill was filed by the assignees of a judgment, without the assignor being a party, it was held, that the plaintiffs could not go on with that part of their case which sought payment of the debt. (*d*)

For the same reason, where a bill was filed against the directors of an unincorporated joint stock company by a holder of shares, of which some were original, and some were alleged to be derivative, without stating with respect to the derivation of them, the manner in which he had become possessed of them, or whether they had been transferred to him, in the manner in which, according to the regulations of the company, such transfer ought to have been made, Lord Brougham appeared to think that the persons by whom the shares had been assigned to the plaintiffs ought to have been parties to the suit. (*e*)

The same principle appears to have been acted upon by the Court of Exchequer, in certain cases in which bills have been filed for tithes by lessees, under parol demises, (which, in consequence of tithes being things lying in grant, are void at law) in which cases, upon demurrers being put in and submitted to, the Court has permitted the plaintiffs to amend their bills *by making the lessors parties to the suit. (*f*) In a recent case of this nature, where an objection to a bill for tithes by a lessee claiming under this description of demise, was taken at the hearing, Lord Lyndhurst, L. C. B., considered that the objection was valid, and would have allowed it but for the circumstance that the plaintiff had originally made the impropriators, who were the lessors, defendants to the suit; but in consequence of their having put in a disclaimer, had, previously to the hearing, dismissed the bill as against them.

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It may be observed here, that although the assignor of a *chose in action* is sometimes made a party defendant to a suit, yet the more general practice is, (especially where the assignment contains, as it almost always does, a power of attorney from the assignor to the assignee to sue in his name,) to make the assignee a co-plaintiff in the bill; in which case, if the assignment is stated upon the record, there will be no necessity to establish it by proof; because the statement in the bill, to which they are both parties, is an admission of the fact, upon which the Court is bound to act. (*g*)

Upon the principle above laid down it is held, that although a creditor or legatee of a person deceased may in some cases, under peculiar circumstances such as an allegation of fraud or collusion, bring a bill against a debtor to the estate, for the purpose of augmenting the fund, (*h*) yet such a suit can in no case be maintained without the personal representative being a party. (*i*) And where a legatee of a term of years sued for it, it was held that he must make the executor a party, although he alleged that he had his assent. (*k*) And even although an executor has actually released his interest in the property sued for, it has been held that he must nevertheless be a party to the suit. (*l*)

Where a testator having been resident in India, where *all his property was, died there, having made a will, whereby he

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(*d*) Cathcart v. Lewis, 1 Ves, jun. 463. (*e*) Walburn v. Ingilby, 1 M & K. 61.
(*f*) Henning v. Willis, 3 Wood, 29; Jackson v. Benson, M'Lel. 62.
(*g*) Ryan v. Anderson, 3 Mad. 174.
(*h*) Attorney General v. Wynne, Mos. 126; Wilson v. Moore, 1 Mylne & K. 126; *et etiam*, where this has been done in cases of partnership, Bowsher v. Watkins, 1 R. & M. 277.
(*i*) Rumney v. Maud, Rep. temp. Finch, 336; Griffith v. Bateman, ib. 334; Attorney General v. Twisden, ib. 336; Conway v. Stroud, 2 Freem. 188.
(*k*) Moore v. Blagrave, 1 Ch. Ca. 277. (*l*) Smithby v. Stinton, 1 Ver. 31.

queathed the residue of his estate to persons resident in this country, but appointed persons in India his executors, who proved the will there, and remitted the proceeds to their agent in this country, it was held, that the residuary legatees could not maintain a suit against the agent without having a representative to the testator in England before the Court. (*m*)

It is to be observed, that in this and all other cases where a claim on property in dispute would vest in the personal representative of a deceased person, and there is no general personal representative of that person, an administration limited to the subject of the suit will be necessary to enable the Court to proceed to a decision on the claim; and when a right is clearly vested, as in a trust term which is required to be assigned, an administration of the effects of the deceased trustee, limited to the trust term, is necessary to warrant the decree of the Court for an assignment of the term. (*n*) In some cases, however, when it has appeared at the hearing of a cause that the personal representative of a deceased person, not a party to the suit, ought to be privy to the proceedings under a decree, but that no question could arise as to the rights of such representative; the Court has, on the hearing, made a decree directing proceedings before one of the Masters of the Court, without requiring the representative to be made a party by amendment or otherwise; and has given leave to the parties in the suit to bring a representative before the Master, on taking the accounts, or other proceedings directed by the decree, which may concern the rights of such representative; and a representative thus brought before the Master is considered as a party to the cause in the subsequent proceedings. (*o*)

It should be noticed here, that by an Act of Parliament passed in the 28 Geo. 3, c. 87, intituled "An Act to facilitate the distribution of assets in cases where the person to whom probate is granted is out of the realm," it is enacted, that at the expiration of twelve calendar months from the death of any testator, if the executor to whom probate has been granted *is then residing [*295] out of the jurisdiction of the Courts of Law or Equity, it shall be lawful for the Ecclesiastical Court which granted probate of the will, upon the application of any creditor, next of kin or legatee, grounded upon such affidavit as therein mentioned, to grant such special administration as therein is also mentioned, which administration shall be written or printed upon paper or parchment, stamped only with one shilling stamp. By the third section of the Act, the form of the administration to be granted in pursuance thereof is given, and is limited "*for the purpose to become and be made a party to a bill or bills to be exhibited against him in any of His Majesty's Courts of Equity, and to carry the decree or decrees of any of the said Courts into effect, and for further or otherwise.*" By the fourth section of the same Act, is is declared, that it shall be lawful for the Court of Equity in which such suit shall be depending, to appoint (if it shall be needful) any person or persons to collect any outstanding debts or effects due to such estate, and to give discharges for the same; such persons or person giving security, in the usual manner, duly to account for the same." And by the fifth section it is enacted, "that it shall be lawful for the Accountant General of the High Court of Chancery, or for the secretary or deputy secretary of the Governor and Company of the Bank of England, to transfer, and for the Governor and Company of the Bank of England to suffer a transfer to be made, of any stock belonging to the estate of such deceased person, into the name of the Accountant General, in trust for such purposes as the Court shall direct, in any suit in which the person to whom

(*m*) Logan v. Fairlie, 2 S. & S. 284. (*n*) Lord Red. 144.
(*o*) Ibid. 145.

such administration hath been granted, shall be or may have been a party; provided, nevertheless, that if the executors or executor, capable of acting as such, shall return to and reside within the jurisdiction of any of the said Courts pending such suit, such executors or executor shall be made party to such suit; and the costs incurred by granting such administration, and by proceeding in such suit against such administrator, shall be paid by such person or persons, or out of such fund, as the Court where such suit is depending shall direct."

[*296] By the sixth section it is further enacted, "that *where an infant is sole executor, administration with the will annexed shall be granted to the guardian of such infant, or to such other person as the spiritual court shall think fit, until such infant shall have attained the full age of twenty-one years, at which period, and not before, probate of the will shall be granted to him." And it is enacted by the seventh section, "that the person to whom such administration shall be granted shall have the same powers vested in him as an administrator now hath by virtue of an administration granted to him *durante minore ætate* of the next of kin."

It is to be observed, that the rule which requires that the trustees, or other persons having the legal estate in the thing demanded, should in all cases be before the Court, has, as we have seen, been adopted on account of the impossibility of otherwise preventing the assertion of the legal right in Courts of Law; for in some cases, where the trustee has had no beneficial interest in the property, and was not possessed of a legal estate which he could set up at law to the annoyance of the defendant in equity, the Court has permitted bills to be filed by the *cestui qui trusts* without making such trustee a party, the *cestui qui trusts* undertaking for him that he shall conform to such decree as the Court shall make. (*r*) Thus where a bill was filed to carry the trusts of a will into execution, whereby, amongst other things, lands were limited to trustees for a term of years, to raise a sum of money by way of portions for younger children, two of which younger children had assigned their shares of the sum to be raised to a trustee for the benefit of the others, but which last trustee was not before the Court: the only question was, whether he ought to be a party to the suit; and the Court was of opinion, that as the trustees of the term who had the legal estate, and all the children who had the beneficial interest, were parties, there was no occasion to make the other trustee a party. (*s*) Upon the same principle, where a man had executed a deed, providing, in case of his

[*297] death, for a certain person and her children, and had deposited *it in the hands of an attorney for the benefit of all parties, but afterwards procured possession of it himself, it was held, on demurrer, that the woman and her children could maintain a suit to compel him to deliver up the deed, without making the attorney with whom it was deposited and against whom no breach of trust was alleged, a party. (*t*)

For the same reason it has been held, that although, as we have seen, the assignor of a *chose in action* is a necessary party to a suit by the assignee, yet the assignee of an equitable interest in the nature of a *chose in action* may maintain a suit for the assertion of that interest without bringing the assignor before the Court. Thus, where one of two joint executors and residuary legatees assigned his share of the residue and died, and afterwards his assignee brought a bill against the other executor for his share of the residue, the Court of Exchequer held that the representatives of the assignor were not necessary parties, as the proof of the receipt of the purchase-money by the assignor would be sufficient evidence of the plaintiff's title. (*u*)

(*r*) Kirk v. Clark, Prec. in Cha. 275.
(*s*) Head v. Lord Teynham, 1 Cox, 57.
(*t*) Kyne v. Moore, 1 S. & S. 61.
(*u*) Blake v. Jones, 3 Anst. 651.

The principle of the Court, that the person having the legal right to sue for the same matter which he might enforce at law against the defendant, should be before the Court at the time of its pronouncing its decision, applies to all persons who have legal demands against the defendant arising out of the same matter: thus, as it has been decided that at law an assignee of a lease may be sued for non-performance of the covenants both by the lessor and the original lessee from whom he derives title, Courts of Equity will not permit either the lessor or lessee to institute proceedings against him in respect of his covenants, without having the other before them, in order that the rights of both may be settled at the same time. Upon this ground, where a man granted a lease of houses for thirty years to B., who covenanted to keep them in good repair, and died, having bequeathed the term to his wife; and afterwards, by *mesne* assignments, the term became vested in a pauper, but the houses becoming out of repair and the rent in arrear, a bill was brought by the lessor against the assignee for repairs, and an account of the arrears of rent; upon an [*298] *objection being taken, that the executors of the original lessee were not parties, the Lord Chancellor said, that to make the proceedings unexceptionable, it would be very proper to have them before the Court; for that it did not appear to him but that the plaintiff might have had a satisfaction at law against the executors, and, *if so, the plaintiff's equity will be their equity.* (x) The same objection was allowed in the case of the *City of London* v. *Richmond*, (y) which was also the case of a bill against the assignee of a lease for payment of rent and performance of covenants.

It is to be observed here, that the rule which requires all persons having similar rights to sue at law with that of the plaintiff to be brought before the Court, does not apply to a bill filed by the last indorsee of a bill of exchange which has been lost, against the acceptor; in which case it has been held that neither the drawer (z) nor the prior indorsees are necessary parties, (a) because in such cases, the ground of the application to a Court of Equity is the loss of the instrument; and the Court only relieves upon the terms of the plaintiff giving the defendant ample security against being called upon again by the drawer or indorsees, in case they should become possessed of the instrument. It has been held, however, that where a suit is instituted by an acceptor against the holder of a bill of exchange which is forthcoming, for the purpose of having it delivered up, there the drawer is a necessary party. (b)

The principle that persons having co-existent rights with the plaintiff to sue the defendant must be brought before the Court in all cases where the subject-matter of the right is to be litigated in equity, is not confined to cases where such co-existent rights to sue are at law; it applies equally to cases where another person has a right to sue, for the same matter, in equity; in such cases the defendant is equally entitled to insist that the person possessing such right should be *brought before the Court before any decree is pro- [*299] nounced, in order that such right may be bound by the decree. Thus, where a bill was filed by a vicar against a sequestrator for an account of the profits of a benefice, received during its vacation it appears to have been thought by the Court that the bishop ought to have been a party to the suit, because the sequestrator was accountable to him for what he had received; (c) and, on the other hand, where a bill was filed by a bishop and a sequestrator against an occupier for an account of tithes during the lunacy of the incumbent, who

(x) Sainstry v. Grammer, 2 Eq. Ca. Ab. 165; c. 6.
(y) 2 Vern. 421.
(z) Davies v. Dodd, 4 Price, 176.
(a) Macartney v. Graham, 2 Sim. 285.
(b) Penfold v. Nunn, 5 Sim. 405.
(c) Jones v. Barrett, Bunb. 192.

had been found a lunatic under a commission, it was held that the incumbent or his committee ought to have been a party. (*d*) It seems, however, that where a living is under sequestration for debt, the incumbent may maintain a suit for tithes without making the sequestrator or the bishop a party. This appears to have been the opinion of Lord Lyndhurst, L. C. B., in *Warrington* v. *Sadler*, (*e*) where a decree was made in a suit by a vicar for tithes, although the vicarage was under sequestration, and the occupiers had actually paid certain alleged moduses to the sequestrator. Upon the principle above stated, it is held, that, in general, where a suit is instituted on behalf of a lunatic either by the Attorney General or his committee, the lunatic himself must be a co-plaintiff, because he may recover his senses, and would not be bound by the decree. In strictness, however, a lunatic ought not to be a party to a suit to be relieved against an act done by himself during his lunacy, because he cannot be heard to stultify himself. (*f*)

The reason for making a lunatic a party, (*g*) namely, that he may recover his senses, does not apply to an idiot, who is considered in law as incapable of recovery. He is, therefore, not a necessary party to a suit instituted for his benefit. (*h*)

[*300] But neither an idiot nor a lunatic can institute a suit, nor can *one be instituted on his behalf, without the committee of his estate being a party either as plaintiff or defendant. (*k*)

In the preceding cases the party required had a concurrent right with the plaintiff in the *whole* subject of the suit; the same rule, however, applies where he has only a concurrent right in a *portion* of it; thus, where there are two joint-tenants for life, and one of them exhibits a bill, the other must be a party, unless the bill shows that he is dead; (*l*) and where A., B. and C. were joint lessees under the City of London, and A. and B. brought a bill against the lessors to have certain allowances out of the rent, and it appeared upon the hearing that C. was living, an objection, because he was not a party to the bill, was allowed; (*m*) and so, where a bill is brought for a partition either by joint-tenants, or tenants in common, as mutual conveyances are decreed, all persons necessary to make such conveyances must be parties to the suit; (*n*) and where one tenant in common had granted a lease of his share for a long term of years, the lessee was held to be a necessary party to the suit, at the expense, nevertheless, of his lessor, who was to be responsible for his costs. (*o*)

Where, however, a tenant in common had demised his share for a long term of years, it was held that the termor for years was entitled to file a bill for a partition against the other tenants in common, without bringing the reversioner of the share demised before the Court; (*p*) and so it seems that where one of the parties is only tenant for life, he may maintain a suit for a partition without the party entitled in remainder. (*q*) Where the object of a suit is to ascertain boundaries, the rule is different, and the Court will not entertain a bill of that description without having the remainder-men and all parties interested before it. (*r*)

(*d*) Bishop of London v. Nicholls, Bunb. 141.
(*e*) 1 Young, 283.
(*f*) Attorney Gen. v. Woolrich, 1 Ch. Ca. 153; Attorney Gen. v. Parkhurst, 1 Ch. Ca. 112: Ridler v. Ridler, 1 Eq. Ca. Ab. 279; *Ante*, 113.
(*g*) *Ante*, 115. (*h*) *Ante*, 115.
(*k*) Woolfryes v. Woolfryes, *ante*, 115.
(*l*) Haycock v. Haycock, 2 Cha. Ca. 124; Weston v. Keighley, Rep. temp. Finch, 82.
(*m*) Stafford v. The City of London, 1 P. Wms. 428; 1 Stra. 95, S. C.
(*n*) Anon. 3 Swan. 139. (*o*) Cornish v. Gest, 2 Cox, 27.
(*p*) Baring v. Nash, 1 Ves. & B. 555. (*q*) Wills v. Slade, 6 Ves. 498.
(*r*) Rayley v. Best, 1 R. & M. 659, *vide etiam*, Miller v. Warmington, 1 Jac. & W. 484; Speer v. Crawter, 2 Mer. 410.

*It is not, however, in general necessary, in questions relating to real property, that the occupying tenants under leases should be [*301] parties, unless their concurrence is necessary, as in the case above referred to of the lessee of a tenant in common; or unless the object of the suit is to restrain an ejectment brought against them instead of against their landlord; as in the case of *Lawley* v. *Walden*, (s) in which Lord Eldon allowed a demurrer for want of parties to a bill by the owner of an estate, to restrain an injunction against his tenant without making him a party; observing, however, that if the plaintiff in equity had been made a defendant at law, instead of his tenant, as he might have been, he should not have thought it necessary to make him a defendant.

But, although it is not usual, in suits relating to property, to make the occupying lessees of such property parties to the proceedings, yet if such lessees, or other persons having only limited interests in the property, seek to establish any right respecting such property, it is necessary that they should bring the owners of the inheritance before the Court, in order that, in case the suit is unsuccessful, the decree of the Court dismissing the bill may be binding upon them. Thus, to a bill by the lessees of property in a parish to establish a modus, the owner of the inheritance must be a party; and for the same reason, if there is a question concerning a right of common, though a leaseholder may enforce it at law, yet if he bring a bill in equity to establish such right, he must bring the persons in whom the fee of his estate is vested before the Court; (t) and so, in a suit in equity to establish a right to fees in an office, although in an action at law for such fees it is not necessary to make any person a party but the one who has actually received such fees, yet in equity it is necessary to have all persons before the Court who have any pretence to a right. (u)

Upon the same principle, where a bill filed by a lessee against a lord of a manor, and the tenant of a particular house, to have the house, which obstructed the plaintiff's way, pulled down, and to be quieted in the possession of the way *for the future, the defendant's counsel objected for want [*302] of parties, because the plaintiff's lessor was not before the Court, and the objection was allowed. (x)

These cases all proceed upon the principle before laid down, namely, that of preventing a defendant from being harassed by a multiplicity of suits for the same thing; in consequence of which principle it is held to be a rule of a Court of Equity, that if you withdraw a question from a Court of Law for the purpose of insisting upon a general right, you must have all the parties before the Court who are necessary to make the determination complete, and to quiet the question. (y)

The application of this rule, however, is strictly confined to cases where the lessee seeks to establish a general right; where he only seeks that which is incidental to his situation as tenant, he need not make his landlord a party. Thus a lessee of tithes may file a bill for tithes against an occupier, without making his lessor a party, because the claim to tithes abstracted, is merely possessory; and, upon the same principle, where an occupier who was sued for tithes by the lessee of an impropriate rector filed a cross bill against such rector for a discovery of documents, &c., a demurrer to such bill by the rector was allowed. (z)

It should be noticed here, that in order to entitle a lessee to sue for tithes without his lessor, he must claim under a *demise by deed*, because tithes, being

(s) 3 Swan. 142. (t) Poore v. Clark, 2 Atk. 515.
(u) Pawlet v. Bishop of Lincoln, 2 Atk. 296.
(x) Poore v. Clark, 2 Atk. 515. (y) Ibid.
(z) Tooth v. The Dean and Chapter of Canterbury, 3 Sim. 61.

things which lie in grant, cannot be demised by *parol*, and a decree in favour of a plaintiff claiming under a verbal demise, would therefore be no bar to another suit for the same tithes by the lessor. Upon this ground, in *Henning* v. *Willis*, (*a*) the Court of Exchequer allowed a demurrer to the plaintiff's bill because the impropriator, who was the lessor, was not a party, and the plaintiff having submitted to the demurrer, obtained leave to amend his bill by making the [*303] impropriator a party. (*b*) A similar demurrer was put in to a bill for tithes *by a lessee under a parol demise, in *Jackson* v. *Benson*, (*c*) and allowed; leave being also given to amend, by making the impropriator a party; and in *Williams* v. *Jones*, (*d*) the principle to be deduced from the foregoing cases was recognized by Lord Lyndhurst, L. C B. In that case the vicar, who was the lessor, had been originally made a party to the suit, but as he had by his answer disclaimed all interest in the tithes in question, the plaintiff had dismissed the bill as against him, and brought the suit to a hearing against the occupier only; and Lord Lyndhurst held, that as the vicar had been originally a party, the circumstance of the bill having been dismissed as against him, made no difference, for although his disclaimer could not be read against the other defendants, no inconvenience could arise, because the lessor, after such disclaimer, would never be allowed to set up any claim against the occupier for the same tithes.

The rule that persons claiming joint interests in an estate cannot sue without making their companions parties, applies equally whether the subject matter of the suit be real or personal property; thus, where a legacy is given to two jointly, one cannot sue for it alone; though where there are several legacies, each may sue for his own. (*e*) And so, where there are several persons interested, as joint-tenants, in money secured by mortgage, they must all be made parties to a bill to foreclose such mortgage. This was decided to be the law of the Court by Lord Thurlow, in the case of *Lowe* v. *Morgan*, (*f*) where a mortgagee had assigned the money secured by the mortgage to three persons as joint-tenants. In that case, his Lordship appears to have laid a stress upon the circumstance of the parties interested in the money being joint-tenants; from which it has been inferred that a tenant in severalty or in common might foreclose as to his share without making the other persons interested in the money parties; and a decree to this effect was actually made in a case where a trustee of money belonging to several individuals had laid it out on a mortgage, and [*304] afterwards one of the persons entitled *to part of the purchase-money filed a bill against the mortgagor and the trustee for his share of the mortgage money or a foreclosure; which was entertained, although the parties interested in the rest of the money were not before the Court. (*g*)

In a late case, however, before Sir John Leach, V. C., it was determined, that there can be no redemption or foreclosure unless all the parties interested in the mortgage money are before the Court; and, on this ground, a bill by a person entitled in severalty to one-sixth of the mortgage money, to foreclose one-sixth of the estate, was dismissed with costs.

As a person entitled to a part only of the mortgage money cannot foreclose the mortgage without bringing the other parties interested in the mortgage

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(*a*) 3 Wood, 29; 3 Gwil. 898.

(*b*) The bill was amended, by making the lessor a defendant, and praying that the occupier might be decreed to account with the lessor, and that what should be found due in the account might be paid into Court for the benefit of the plaintiff. *Vide* Lord Lyndhurst's judgment in Williams v. Jones, Young, 255.

(*c*) M'Lel. 62; 13 Pri. 131.

(*d*) 1 Young, 252.

(*e*) Haycock v. Haycock, 2 Ch. Ca. 124.

(*f*) 1 Bro. C. C. 368.

(*g*) Montgomerie v. The Marquis of Bath, 3 Ves. 560.

money before the Court, so neither can a mortgagee redeem the mortgaged estate without making all those who have an equal right to redeem with himself parties to the suit.

For this reason it was held, in *Lord Cholmondeley* v. *Lord Clinton*, (*h*) that where two estates are mortgaged to the same person for securing the same sum of money, and afterwards the equity of redemption of one estate becomes vested in a different party from the other, the owner of one cannot redeem his part separately. The mortgagee is entitled to insist that the whole of the mortgaged estate shall be redeemed together; and, for this purpose, that all the persons interested in the several estates or mortgages should be made parties to a bill seeking an account and redemption.

The same rule prevailed in *Palk* v. *Lord Clinton*, (*i*) which differed from that of *Lord Cholmondeley* v. *Lord Clinton*, above cited, in the circumstance, only, of its being a bill by a second mortgagee of part of an estate to redeem a first mortgage, which embraced the whole property. Lord Orford had conveyed certain estates in the counties of Dorset, Devon and Cornwall, by way of mortgage, to Sir E. Hughes, who afterwards died, and the mortgage became vested in the executors of his wife, Lady Hughes. Upon the death of Lord Orford, the Dorsetshire *estates became the property of Mr. Walpole; and the Devon and Cornwall estates became vested in trustees for Lord Clinton, who mortgaged them to Sir R. Palk, the plaintiff. Upon the hearing of the cause, an objection was taken, because Mr. Walpole, in whom the Dorsetshire estate was vested, was not before the Court; and Sir William Grant, in giving judgment in favour of the objection, said, "The right to bring him (Mr. Walpole) into Court is the necessary consequence of the right to redeem the mortgage upon his estate. The plaintiff insists that he has a right to redeem the whole of Lady Hughes's mortgage, not only so far as it affects the estate of Lord Clinton, the plaintiff's mortgagor, but also as it affects the estate of Mr. Walpole; then he will have a right to call upon him to attend the account, and when it is taken, and the plaintiff has redeemed Lady Hughes's executors, to call upon Mr. Walpole to pay the amount or be foreclosed. It is now clearly settled that a subsequent mortgagee must redeem the entire mortgage of a prior mortgagee. There would be some ground for the objection if the plaintiff might redeem Lady Hughes's executors by parcels, so much as affects the estate of his mortgagor, Lord Clinton; but that is not competent to him, he must redeem them altogether or not at all. He must pay off the whole sum, and put himself completely in their stead. The same law that gives him the right to call upon Lady Hughes's executors to convey an estate with which he has no connection, *imposes upon him the duty*, as well as gives him the right, to call upon the owner of that estate to be a party." (*k*)

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In the above cases, the mortgage of the two estates was for the same sum of money, and was part of the same transaction. The rule, however, has been extended to cases where a mortgage has been of two distinct estates to the same mortgagee for securing different sums of money; and it has been decided in many cases, that a mortgagee of two separate estates, upon distinct transactions from the same mortgagor, is entitled to hold both mortgages till the amount due upon both be discharged; and *that* even against the purchaser *of the equity of redemption of one of the mortgaged estates without notice; so that the mortgages, although for distinct sums, are in effect for one sum. Upon this principle, where the purchaser of the equity of redemption of a mortgaged estate filed his bill against the mortgagee, to redeem, and the

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(*h*) 2 Jac. & W. 3, 134.
(*i*) 12 Ves. 48.
(*k*) Palk v. Lord Clinton, 12 Ves. 61.

defendant, by his answer, stated a subsequent mortgage made to him, by the same mortgagor, of a distinct estate for a distinct debt, it was held that the persons interested in the equity of redemption of the second mortgage were necessary parties to the suit. (*l*) And this rule prevails although one mortgage be a pledge of personalty and the other a mortgage of realty. (*m*) It does not, however, hold longer than while both mortgages continue united in the same mortgagee; so that if a mortgagee, having two distinct mortgages on two separate estates, assigns one of the mortgages to a third person, the assignee of the assigned mortgages need not be brought before the Court in a suit to redeem the other. (*n*)

The rule which requires that in a bill filed for the purpose of redeeming a mortgage, the plaintiff should bring before the Court all those who, as well as himself, have a right to redeem, has been held to apply to a second incumbrancer filing a bill to redeem a prior incumbrance, who must, in such case, bring the mortgagor, as well as the prior incumbrancer, before the Court. (*o*) This is a rule of long standing, and was followed by Lord Thurlow, when his adherence to it was very inconvenient in consequence of the heir-at-law of the mortgagor being abroad. His Lordship then said, that it seemed to him "impossible that a second mortgagee should come into Court against the first mortgagee without making the mortgagor or his heir a party. The natural decree is, that the second mortgagee shall redeem the first mortgagee, and that the mortgagor shall redeem him or be foreclosed." (*p*) The same rule was confirmed by Lord Eldon, in *Palk* v. *Lord Clinton*, (*q*) and has ever since been acted upon as the rule of the Court.

[*307] *But although a second mortgagee, seeking to *redeem* a first mortgagee, must make the mortgagor or his heir a party, yet he may, if he please, *foreclose* the mortgagor and a third mortgagee, without bringing the first mortgagee before the Court, because by so doing he merely puts himself in the place of the mortgagor and subsequent mortgagee, and leaves the first mortgagee in the situation in which he stood before. (*r*) For the same reason it has been held that a third mortgagee buying in the first, need not make the second mortgagee a party to a bill to foreclose the mortgagor. Upon the same ground it is also considered unnecessary, in a bill by incumbrancers for the sale of an estate, to make annuitants, or other prior incumbrancers, parties; (*s*) and so in a suit for the execution of a trust by those claiming the ultimate benefit of the trust after the satisfaction of prior charges, it is held not to be necessary to bring before the Court the persons claiming the benefit of such prior charges; and therefore, to a bill for the application of a surplus after payment of debts or legacies, or other prior incumbrances, the creditors, legatees or incumbrancers need not be parties. (*t*)

Upon the same principle, where, on a bill filed by a creditor against the representative and heir of a trader, for the purpose of having certain freehold and copyhold estates, which had been devised to him, sold, the annuitants and legatees under the will of the father were made parties, but the Master of the Rolls held, that as their incumbrances were prior to the interest of the son, they ought not to have been parties. (*u*)

The same principle which calls for the presence of all persons having an interest in the equity of redemption in the case of bills to redeem a mortgage,

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(*l*) Ireson v. Denn, 2 Cox, 425. (*m*) Jones v. Smith, 6 Ves. 239, n.
(*n*) Willie v. Lugg, 2 Eden. 78.
(*o*) Thompson v. Baskerville, 3 Ch. Rep. 215.
(*p*) Fell v. Brown, 2 Bro. C. C. 276. (*q*) 12 Ves. 48.
(*r*) Lord Hollis's case, cited 3 Ch. Rep. 86.
(*s*) Rose v. Page, 2 Sim. 471. (*t*) Lord Red. 143.
(*u*) Parker v. Fuller, 1 Russ. & M. 656.

requires that where a mortgagee seeks to foreclose the mortgagor, he should bring before the Court all persons claiming an interest in the mortgage under himself; therefore, if there are several derivative *mortgagees, they [*308] must all be parties to a bill of foreclosure. (x)

If, however, a mortgagee has assigned or conveyed away from himself not only the money due on the mortgage, but also the mortgaged premises, the assignee may, as we have seen foreclose without making the original mortgagee a party; and upon the same principle it may also be inferred, from the case of *Renvoize* v. *Cooper*, (y) that where a mortgagee has devised his interest in the mortgage in such a manner as to pass not only the mortgage money but the estate mortgaged, the devisee alone may foreclose without making the heir-at-law of the original mortgagee a party, unless he claims to have the will established; (z) in which case he must be made a defendant, because it has been held that a devisee and heir cannot join in the same suit, even upon an allegation that they have agreed to divide the matter in question between them. (a)

The rule which requires that all parties interested in the object of a suit should be party to the bill, applies to all cases in which an account is sought against a defendant. One person cannot exhibit a bill against an accounting party without bringing before the Court all persons who are interested in having the account taken, or in the result of it, otherwise the defendant might be harrassed by as many suits as there are parties interested in the account. Thus in a suit for a share of a partnership adventure, it is in general necessary that all persons having shares in the same adventure should be parties; (b) and a residuary legatee seeking an account and share of the residue, must bring before the Court all the parties interested in that residue. (c) And so where a moiety of a residue was given to one of the defendants for life, and, upon his decease, to such persons as she should appoint, and in default of appointment, *to certain other persons for life, it was held that the other [*309] persons, although their interests depended upon such a remote contingency, ought to be before the Court. (d)

Upon the same principle it is, that in suits by next of kin against a personal representative for an account, the Court requires that all the next of kin should be before it; and it is to be observed, that in all (e) cases where the parties claim under a general description, or of being some of a class of persons entitled, the Court will not make a decree without being first satisfied that all the individuals of the class, or who come under the general description, are before it. For this purpose the Court, in cases of this description, before directing an account, or other relief prayed by the bill, invariably refers it to one of the Masters to inquire who the individuals of the class, or answering the general description, are; and then, if it turns out that any of them are not before the Court, the plaintiff must file a supplemental bill, for the purpose of bringing them in, before the cause is finally heard. (f)

(x) Hobart v. Abbot, 2 P. Wms. 643. (y) Mad. & Geld. 371.

(z) Lewis v. Nangle, 2 Ves. 631.

(a) Cholmondeley v. Clinton, 1 T. & R. 104, 116.

(b) Ireton v. Lewis, Rep. t. Finch, 96; Moffat v. Farquharson, 2 Bro. C. C. 338.

(c) Parsons v. Neville, 3 Bro. C. C. 365. In Cockburn v. Thompson, 16 Ves. 328, Lord Eldon said, this admits of an exception, where it is not necessary, or inconvenient.

(d) Skerrit v. Birch, 3 Bro. C. C. 229.

(e) Where one of the next of kin of an intestate who died in India, procured letters of administration to his effects here, it was held that he might sue the person who had taken out an Indian administration, and had afterwards come to this country, without making the rest of the next of kin parties; Sandilands v. Innes, 3 Sim. 264.

(f) *Sed vide* Waite v. Templer, 1 S. & S. 319.

The rule that all persons interested in an account should be made parties to a suit against the accounting party, will not apply where it appears that some of the parties interested in such account have been accounted with and paid; thus in the case of a bill by an infant *cestui qui trust* coming of age, for his share of a fund, it is the constant practice to decree an account without requiring the other *cestui qui trusts*, who have come of age before, and have received their shares, to be before the Court. And in the case of a partnership, where a bill was filed against factors by the persons interested in one moiety of a cargo of tobacco, for a discovery and account as to that moiety, without making the person interested in the other moiety a party, and it appeared that the defendants had distinguished in their accounts between him and the plaintiffs, and had divided the funds, and kept separate accounts, the Court held that the [*310] owner of the other moiety was not a necessary party to the *suit. (g) And where A. B. C., being partners together, and A. agreed with D. to give him a moiety of his share in the concern, it was held that an account might be decreed between A. and D., without making B. and C. parties. (h) It is also held, that to a bill by a person entitled to a certain aliquot portion of an ascertained sum in the hands of trustees, the *co-cestui qui trusts* are not necessary parties. (i) In some cases, where a party having a joint interest with the plaintiffs in the taking of an account has been abroad, the cause will be allowed to go on without him; thus in the Exchequer, where a bill was filed by some of the children of a freeman of London, who was dead, for an account and division of his personal estate, and it appeared that one of the children was beyond sea, the Court was moved that they might hear the cause without him; and that if it appeared that he had any right, he might come before the deputy remembrancer on the account; and, though no precedent was produced of such an order, the Court gave liberty to hear the case without him. (j)

The question whether a trustee of an estate can be called upon by a purchaser of a portion of an estate sold to different persons under a trust for sale, without bringing all the other persons interested in the same estate before the Court, was discussed before Lord Eldon, in the case of *Goodson* v. *Ellison*; (k) in that case the persons beneficially interested in an estate vested in trustees had, many years before the commencement of the suit, proceeded to sell the entirety in various lots, one of which was purchased by the plaintiffs, and all the persons beneficially interested joined in conveying it to him. The trustee, however, did not join, and upon his death the legal estate became vested in the defendants, upon whose refusal to convey without the sanction of the Court, the bill was filed, and a decree for a conveyance by the defendants was pronounced by Lord Gifford, who directed that they should pay the costs of the suit. Upon appeal, however, to Lord Eldon, his Lordship expressed considerable doubts whether a trustee could be called upon to divest himself of [*311] *a trust by conveying different parcels of the trust property at different times, and whether it was not therefore necessary to have all the other *cestui qui trusts* before the Court; but upon re-argument the Lord Chancellor stated, that he thought there were parties enough before the Court to enable him to make a decree, but as it was the case of an old trust, he thought the Court was bound to inquire into the facts, and that the trustees had a right to have the conveyance settled in the Master's office.

(g) Weymouth v. Boyer, 1 Ves. jun. 416.
(h) Brown v. De Tastet, Jac. 284. *Vide etiam*, Bray v. Fromont, 6 Mad. & Geld. 5.
(i) Smith v. Snow, 3 Mad. 10. (j) Rogers v. Linton, Bunb. 200.
(k) 3 Russ. 583.

It is a general rule, arising out of the preceding principles, admitting of very few exceptions, that a trustee cannot, under ordinary circumstances, institute proceedings in Equity relating to the trust property, without making the *cestui qui trusts* parties to the proceeding. (*l*) Thus, where a bill is filed by trustees for sale, against a purchaser, for a specific performance of the contract, the *cestui qui trusts* of the purchase-money must be parties unless there is a clause in the trust-deed declaring the receipt of the trustees to be a sufficient discharge, which is considered as a declaration by the author of the trust, that the receipt of the persons beneficially interested in the produce of the sale shall not be necessary; (*m*) and where a bill was filed by certain persons, describing themselves as trustees for a society consisting of a great number of persons, for the specific performance of an agreement entered into by themselves for the benefit of the society, and a demurrer was put in because the members of the society were not parties to the suit, upon the argument of which, it was insisted that a trustee could not file a bill respecting the trust property, without making the *cestui qui trust* a party; and that, although the members of the society were so numerous that it was not practicable to make all of them parties, the bill ought to have been filed by some of them on behalf of themselves and the others, and that it did not appear by the bill that the plaintiffs were even members of the society, the demurrer was upon these grounds *allowed. (*o*) [*312] Upon the same principle, if a mortgagee dies, and his heir files a bill of foreclosure, the executor of the mortgagee must be a party, because, although at law the legal right to the estate is in the heir, yet in equity he is only considered as a trustee for the executor, who is the person entitled to the mortgage money, (*p*) and for this reason, where the heir of the mortgagee had foreclosed the mortgagor without making the executor of the mortgagee a party, and a bill was filed by the executor against the heir, the land was decreed to the executor. (*q*) It seems, however, that although the personal representative is the person entitled to receive the money, the heir has a right to say that he will pay off the mortgage to the executor, and take the benefit of the foreclosure himself; (*r*) and for this reason as well as that before stated, the heir of a mortgagee is a necessary party to a bill of foreclosure by the personal representative, unless the mortgagee has devised the mortgaged estate, in which case, as we have seen, his heir is not a necessary party to a bill by the devisee to foreclose the equity of redemption. (*s*)

There are instances in which, under peculiar circumstances, trustees are allowed to maintain a suit, without their *cestui qui trusts*, as in the case before mentioned, of trustees under a deed, by which estates are vested in them upon trust to sell and to apply the produce amongst creditors or others, with a clause, declaring the receipt of the trustees to be a good discharge to the purchasers. (*t*) In cases also where the interest of the *cestui qui trust* is collateral to the rights between the plaintiff and the defendant, a person standing in the place of *trustee has been allowed to maintain a suit respecting the trust [*313] property, without making the persons for whom he is trustee, parties; thus the pawnee of a chattel or his representative may maintain a suit for the chattel

(*l*) Kirk v. Clark, Prec. Cha. 275.

(*m*) *Per* Sir J. Leach, V. C., Calverly v. Phelp, Mad. & Geld. 232.

(*n*) Douglas v. Horsfall, 2 S. & S. 184.

(*p*) Freake v. Hearsey, Nels. 93; 2 Freem. 180, S. C.; 1 Ch. Ca. 51, S. C.; 2 Eq. Ca. Ab. 77, S. C.

(*q*) Gobe v. Carlisle, cited 2 Vern. 66. (*r*) Clerkson v. Bowyer, 2 Vern. 67.

(*s*) Renvoize v. Cooper, Mad. & Geld. 371; *ante*, 308.

(*t*) See Calverly v. Phelp, Mad. & Geld. 229; as to foreclosure in such cases, *vide post*, S. C.

without making the pawner a party. And so in the case of *Saville* v. *Tancred*, (*u*) where a bill was brought for an account, and for the delivery of a strong box, in which were found jewels, and a note in these words: "Jewels belonging to the Duke of Devonshire," in the hands of Mr. Saville, whose representative the plaintiff was, and in whose possession they had been for fifty years, and an objection was taken that the Duke's representative ought to have been a party, it was held that the plaintiff might sustain the suit without him. And upon the same principle, where one of two trustees had been prevailed upon by his co-trustee to transfer the trust fund into his name alone, and the co-trustee afterwards sold the stock, and received the produce, and never replaced it; upon a bill filed by the trustee against his co-trustee to compel him to replace the stock, a demurrer was put in, on the ground that the *cestui qui trusts* of the fund were not made parties, which upon argument was overruled. (*x*)

And here it may be observed, that the personal representative in all cases represents the personal estate of the deceased, and is entitled to sue for it in equity as well as law, without making the residuary legatees, or any of the other persons interested in it, parties to the suit. For this reason, where a woman by her will gave all her personal estate to her bastard child, and made B. & C. her executors, and died; and within a short time after the bastard died intestate; upon a bill filed by the executor against a person in whose hands the property of the mother was, praying for an account, the defendant demurred, because the representative of the bastard and the Attorney General were not parties; and the demurrer was over-ruled, it being held that the executor was legally entitled to the estate of his testatrix; and though this may be in trust for another, yet as the executor has the legal title, he can give a good discharge [*314] *to the defendant. (*y*) And in every case, an executor, though a bare trustee, and though there be a residuary legatee, is entitled to sue for the personal estate in equity as well as at law, unless the *cestui qui trusts* will oppose it. (*z*)

The same principle applies to the cases of assignees of bankrupts or insolvent debtors, who may either maintain or defend suits relating to the estates vested in them as such assignees, without the creditors for whom they are trustees being made parties to the suit. (*a*) Nor is it necessary in such case, that the bankrupt or insolvent, though interested in the residue, should be before the Court, (*b*) though, from a decision in Mr. Vernon's Reports, it appears to have been formerly considered necessary in suits by assignees to have the bankrupt before the Court. (*c*) Where, however, creditors, instead of seeking relief under the commission, proceed at law against the bankrupt, the bankrupt may file a bill of discovery in aid of his defence at law, and for an injunction; and where there are complicated accounts, he may pray to have them taken, and to have the balance due to him from the defendants set off against the demand of the creditors, without making his assignees parties, (*d*) but he cannot pray to have the balance paid to him, because that belongs to his assignees.

The rule, that where the persons, by law entitled to represent the personal estate, is the party suing, legatees or other persons interested in the estate need not be parties, does not extend to the case of a residuary legatee suing for his share of the residue, in which case, as we have seen, it is necessary that all the residuary legatees should be before the Court. Nor does it apply to real

(*u*) 1 Vesey, 101; 3 Swanst. 141, S. C.
(*x*) Franco v. Franco, 3 Ves. 77.
(*y*) Jones v. Goodchild, 3 P. Wms. 33.
(*z*) Ibid. 48.
(*a*) Spragg v. Binkes, 5 Ves. 587.
(*b*) 3 P. Wms. 311, *in notis*.
(*c*) Sharp v. Gamon, 2 Vern. 32; 1 Eq. Ca. Ab. 72; Pl. 7, S. C.
(*d*) Lowndes v. Taylor, 1 Mad. 423.

estates; therefore where legacies are charged upon real estates, it will not be sufficient to bring the executors before the Court, but all the other legatees must be parties; (e) it seems, however, that trustees of a real estate for payment of debts, may sustain a suit, either as plaintiffs or *defendants, without bringing before the Court the creditors or legatees for whom they are trustees. (f) [*315]

But although in ordinary cases the executor represents the whole personal estate, and no legatee need be a party, because the personal estate may be exhausted by the debts, and the interest of the legatee is therefore uncertain, the appointees under the will of a *feme covert* are in a different situation, their interest cannot be defeated by debts, and they are in the common situation of *cestui qui trusts*, and must be made parties; therefore, where the administrator with the will annexed of a married woman, filed a bill, praying that the defendants might pay over to him a sum of money, as to which a testamentary appointment had been executed by the testatrix, by virtue of a power in her marriage settlement, without making the appointees parties, the Court ordered the case to stand over, with leave for the plaintiff to amend by bringing the appointees before the Court. (g) Where, however the appointees were very numerous, and the bill was filed by some of them on behalf of themselves and the others, the Court dispensed with the general rule which required them all to be parties. (h) It is to be observed, that in *Craker* v. *Parrott*, (i) on a bill filed by one of four children, who where appointees of their mother, to set aside the appointment on account of the unfairness of the distribution, it was held that all the other children who were appointees need not be parties, because they might go in before the Master.

But although an executor or administrator, as representing the personal estate and all those interested in it, may sue for the recovery of any part of that estate without making the persons beneficially interested parties to the proceeding, yet where there are more than one executor or administrator, one cannot maintain a suit alone without the others; (k) and where to a bill filed by one executor, a demurrer was put in on the ground that a co-executor, who was an infant, was no party, the bill was ordered to be amended. (l) Where, however, one executor of several has alone proved, he may *sue without making the other executors parties, although they have not renounced. (m) [*316] In this respect, the rule of Courts of Equity is different from that of Courts of Law, as there, if there be several executors or administrators, they must all join in bringing actions, though some have not proved the will, or have refused before the ordinary. (n) In another respect also, the rules adopted by Courts of Equity differ from those of Courts of Law in matters of this description, because at law, all persons having a joint interest, must join in an action as plaintiffs; but in equity it is sufficient that all parties interested in the subject of the suit should be before the Court either as plaintiffs or defendants; therefore one of two or more assignees of a bankrupt may sue in equity without his

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(e) Morse v. Sadler, 1 Cox. 352.
(f) Lord Red. 142.
(g) Court v. Jeffery, 1 S. & S. 105.
(h) Manning v. Thesiger, 1 S. & S. 106.
(i) 2 Cha. Ca. 228.
(k) Offley v. Jenney, 3 Cha. Rep. 92.
(l) Ibid.
(m) Davies v. Williams, 1 Sim, 5. But where a person devises that his executors should sell his land, and leaves two executors, one whereof dies and the other renounces, and administration is granted to A., who brings a bill against the heir to compel a sale, it seems doubtful whether the renouncing executor, in whom the power of sale collateral to the executorship was vested, ought not to be made a party. Yeates v. Compton, 2 P. W. 308.
(n) Kilby v. Stanton, 2 Younge & Jerv. 77; and *vide* Williams on Executors and Administrators, 1147, and the cases there cited.

co-assignees, provided they are made defendants, (*o*) and so one executor may sue without his co-executor joining, if the co-executor be made a defendant. It appears, that in a case of this description, Lord Thurlow at first doubted whether the co-executor was entitled to his costs, but that he at length ordered them to be paid to him. (*p*)

It may be collected from several of the preceding cases, that although it is necessary to have before the Court all persons claiming concurrent interests with the plaintiff, yet it is not requisite, in order to make a person a necessary party, that such interest should be immediate, it will equally apply, whether the interest be in possession, remainder or reversion; and upon this principle it is held, that in all cases in which an estate is claimed, against another, by a person deriving title under a settlement, made either by deed or will, it is necessary to make all the persons claiming under such settlement parties to the suit. *down to the person entitled to the first vested estate of inheritance, either in fee or in tail, inclusive.* *Upon this principle, where a bill was filed for the execution of a trust for settling an estate on several branches of a family, it was held necessary to make the first person entitled to the inheritance, a party. (*q*) And where A. was tenant for years, with remainder to B. for life, with remainder to C. in fee, and B. brought a bill against A. for an injunction to restrain his committing waste, it was held that the remainder-man, or reversioner in fee, ought to be before the Court. (*r*)

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It is not however necessary, in such cases, to bring before the Court any person entitled in remainder or reversion after the first vested estate of inheritance, because such person is considered sufficient to support all those who are in remainder behind him; and where an exception was taken to a bill, for want of proper parties, because a remainder-man expectant upon an estate tail was not a party; the exception was over-ruled, because such a remainder-man is not regarded in equity. (*s*)

It is to be observed, that although in cases of this description, the first person in existence who is entitled to a vested estate of inheritance, is sufficient to represent all remainders behind him, yet it is necessary, that all persons entitled to intermediate estates, prior to the first vested estate of inheritance, should be before the Court; thus, where a marriage settlement was made of lands on the husband for life, remainder to the wife for life, with divers remainders over, and a bill was brought by the husband, in order to have the opinion of the Court whether a certain parcel of land was not intended to be included in the settlement, and the wife was not a party, the case was ordered to stand over, in order that she might be made a party, the Court being of opinion, that if a decree should be made against the husband, it would not bind her; (*t*) and so, where a bill was brought by a son, who was remainder-man in tail under a settlement, against his father, who was tenant for life under the same settlement, to have the title-deeds brought into Court that they might be forthcoming for the benefit of all parties interested; and objections were taken for want of parties, one *of which was, that a daughter of the defendant, who was interested in a trust term for years, prior to the limitation to the plaintiff was not before the Court, Lord Hardwicke held the objection good. (*u*)

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Another objection in the same case was, because certain annuitants of the son, upon his reversion after the death of his father, were not parties, and Lord

(*o*) Wilkins v. Fry, 1 Mer. 244.
(*p*) Blount v. Burrow, 3 Bro. C. C. 90.
(*q*) Finch v. Finch, 2 Ves. 492.
(*r*) By Lord King, in Mollineux v. Powell, cited 3 P. Wms. 268, n. *Sed vide* 1 Dick. 197, 198, and Eden on Injunctions, 163.
(*s*) Anon. 2 Eq. Ca. Ab. 166.
(*t*) Herring v. Yeo, 1 Atk. 290.
(*u*) Pyncent v. Pyncent, 3 Atk. 571.

Hardwicke held, that he could not make the order prayed until the annuitants were first heard, and that consequently the objection must be allowed. (x) From this it would seem, that although a remainder-man in tail, may maintain a suit without bringing the persons entitled to subsequent remainders before the Court, yet if he has charged or incumbered his estate in remainder, the persons interested in such charge or incumbrance must be parties; and it is held, that a person claiming under a limitation by way of executory devise, not subject to any preceding estate of inheritance by which it may be defeated, must be a party to a suit in which his rights are involved; (y) but executory devises to persons not *in esse*, may be bound by a decree against the first estate of inheritance. Where the intermediate estate is contingent, and the person to take is *not* ascertained, it is sufficient to have before the Court the trustees to support the contingent remainder, together with the first person *in esse* entitled to the first vested estate of inheritance. (z) Lord Hardwicke, in *Hopkins* v. *Hopkins*, (a) states the practice upon this point: "If (says he,) there are ever so many contingent limitations of a trust, it is an established rule, that it is sufficient to bring the trustees before the Court, together with him in whom the first remainder of the inheritance is vested; and they that may come after will be bound by the decree, though not in *esse*, unless there be fraud or collusion between the trustees, and the first person in whom the remainder of the inheritance is vested."

Thus, in *Lord Cholmondeley* v. *Lord Clinton*, (b) in which the estate which was the subject of litigation was settled upon Baron Clinton for life, and, after remainders to his children (who *were unborn) and their heirs in tail, upon the person who should then be entitled to claim as Baron [*319] Clinton in tail, with ultimate remainder to the existing Lord Clinton in fee, it was objected that the person presumptively entitled to the barony, ought to have been a party; but Sir William Grant over-ruled the objection upon the ground above stated.

If a person entitled to an interest prior in limitation to any estate of inheritance before the Court, should be born pending the suit, that person must be brought before the Court by *supplemental bill;* (b) and if the first tenant in tail, who is plaintiff in a suit, dies without issue before the termination of the suit, the next remainder-man in tail, although he claims by new limitation, and not through the first plaintiff as his issue, is entitled to continue the suit of the former tenant in tail by supplemental bill, and to have the benefit of the evidence and proceedings in the former suit (c)

In all the preceding cases the rights of the several parties to the subject-matter in litigation were consistent with each other, and were the result of the same state of facts, so that the same evidence which would establish those facts would establish the rights of all the parties to maintain the litigation; the rules, therefore of equity, require that all those parties so deriving their right of litigation from the same facts, should be brought before the Court, in order that such their rights may be simultaneously disposed of. In cases, however, where the claims of the several parties claiming the subject-matter of the suit do not arise out of the same state of circumstances, but can only be supported upon grounds which are inconsistent with each other; so that if the grounds upon which the plaintiff supports his claim be correct, the case relied upon by the other parties claiming the same thing cannot be supported, then such other parties need not be brought before the Court. And the reason of this is obvious, for if a plain-

(x) Ibid.
(z) Lord Cholmondeley v. Lord Clinton, 2 J. & W. 1.
(a) 1 Atk. 590.
(b) Lord Red. 141.
(y) Lord Red. 141.
(b) *Ubi supra.*
(c) Lloyd v. Johnes, 9 Ves. 58.

tiff resting his case upon a particular title, which is inconsistent with the title set up by the other claimants, is able to establish the truth of his case by evidence, he will be entitled to a decree against the defendant whom he sues; [*320] if he is not in a *situation to establish his case, his bill must of course be dismissed, and the circumstance of his having brought other parties claiming under a different title before the Court, would be of no advantage to the defendant principally sued, because, if the plaintiff fails in his claim, the bill must be dismissed as against them as well as against the principal defendant, and such dismissal can be no bar to prevent the other parties, themselves, from asserting their claim against the defendant. This principle was acted upon by the late Lord Chief Baron Richards, in the case of *Williamson* v. *Lord Lonsdale*, (*d*) which was a suit filed by a vicar against occupiers for tithes, and his Lordship refused to give an impropriator, who had been made a party to the suit, his costs at the hearing, on the ground that he ought to have demurred to the bill. In that case it was clear that the vicar could only recover the tithes sought, under an endowment, the existence of which he must have established by proof before he could have obtained a decree against the occupier. This proof, at the same time that it showed his right to a decree against the occupier, showed also that he had no right to any decree against the impropriator, so that the bill, as against the impropriator, must have been dismissed, and such dismissal would have been no bar to any subsequent proceedings by the impropriator against his co-defendant. The same rule was afterwards acted upon by the same learned Judge in a subsequent case of *Patch* v. *Dalton*, (*e*) which was the case of a suit for tithes by a vicar against an occupier, who set up, by way of defence, a right in the rector.

It is right here to observe, that the authority of these decisions has since been called into question by Sir Thomas Plumer, in the case of *Daws* v. *Benn*. (*f*) In that case a bill was filed by an impropriator against an occupier for tithes, who set up, by way of defence, a demand made upon him by the vicar, to whom he had paid the tithes in question. Upon the answer coming in, the vicar was [*321] made a party, but died before *the cause came on. At the hearing, it was objected that the new vicar and the representatives of the late vicar ought to be parties, in answer to which, the above cases before Lord Chief Baron Richards were cited; but the Master of the Rolls allowed the objection, to the extent of considering the present vicar a necessary party, but observed, that as the sum received by the late vicar was very small, his representatives might be dispensed with. It is to be remarked, however, that in giving his judgment, the learned Judge expressly said, that the opinion of the Lord Chief Baron was entitled to very great weight and consideration, and ought not to be disturbed, and that he did not wish it to be understood that there is any general rule always to make a vicar a defendant, as such a rule would be very inconvenient; for this was a usual mode of recovering tithes, and as the suit involved no question of right, it would be quite unnecessary, and would only be to load the proceedings with additional expense. His Honor, in fact, decided the case upon the special circumstances, of which a very strong one was, that an action at law had already been brought against the occupier for the purpose of deciding the right, in which the rector had been nonsuited, so that this was the second suit which the occupier had been subjected to, and it was considered very hard upon him to be thus harassed without having the real

(*d*) Daniell's Exch. Rep. 171; 9 Pri. 187, S. C. *Vide etiam* Williams v. Price, Dan. 13; 4 Pri. 156; and Carte v. Ball, 3 Atk. 500.

(*e*) *Scacc.* Jan. 1819, cited 1 Jac. & W. 515.

(*f*) 1 Jac. & W. 513.

question decided in such a manner that he might be made safe in paying one of the parties. "In such a case, (His Honor observed,) to determine it behind the back of the vicar would be doing nothing; he will not be bound, and besides that, he may have in his possession all the evidence required by the defendant, and although it might be said that by *subpœna* he may be made to produce it, yet we all know the difficulty of that course of proceeding; even if you know what documents there are, so as to be able to specify them, it may then be a question whether he can be obliged to produce them; it is therefore highly necessary, if the plaintiff will agitate the question again, that he should do it in a manner in which the right may be determined. It will not otherwise answer his purpose, for he does not institute the suit for the sake of the 3*l.* 15*s.*, but to have the right decided, and this can only be done between the *parties who contest it. Accordingly, the bill states the claim of the [*322] vicar, puts it in issue, and makes him a defendant."

The inference to be drawn from this case before Sir Thomas Plumer, amounts therefore to nothing more than this, viz: that in general, on a bill filed by an impropriate rector for the recovery of tithes from an occupier, the vicar is an unnecessary party, and so is the impropriator to a bill of the same nature by a vicar, unless the object of the suit is to decide the right as between the vicar and impropriator, in which case it appears to have been the opinion of Sir Thomas Plumer that they must both be brought before the Court. With great deference, however, to so great an authority, it does appear to the writer that they are unnecessary parties, and that for the reason stated by the Lord Chief Baron, namely, that no decree could be made against them; for if a bill be filed by a vicar against an occupier, and an impropriator be made a party, whatever the result of the suit with regard to the occupier may be, the only result, with regard to the impropriator, must be the dismissal of the bill against him; and so with respect to the vicar in a suit by an impropriator, if the plaintiff should fail in his claim, of course the result of the suit must be the dismissal of his bill against the defendant, and if he should succeed as far as the vicar is concerned, the consequence must be the same, so that the dismissal of the suit cannot be considered as deciding the question. It is to be observed, that in the same case of *Dawes* v. *Benn*, (*g*) when it came on again for hearing, his Honor's opinion seems to have experienced a considerable alteration. It appears by the report of what took place upon that occasion, that notwithstanding the judgment pronounced on the former occasion, the plaintiff did not avail himself of the opportunity given him of bringing the new vicar before the Court, but filed a bill of revivor against the representatives of the former vicar, and in consequence an objection was taken because the existing vicar had not been made a party pursuant to the opinion of the learned Judge, according to which it was necessary that he should be before the Court for the purpose of supporting the right. The Master of Rolls, *however, allowed the cause to go on, [*323] observing, "There are two ways of considering the question of the necessity of making the vicar, who has become such since the commencement of the suit, a party to it: first, whether it is necessary in respect of the right, and secondly, in respect of the account. Now in respect of the right, I think it is not necessary, because the bill is for an account only, and not to establish any right; in another suit there may be another decision, but the vicar may be interested in the account, and for that reason may be a necessary party." His Honor then, after observing that he did not recollect any case where the circumstance of a vicar dying before the hearing had occurred, and that fortunately he had not to deal with the difficulty then, as the plaintiff had waived

(*g*) 1 Jacob, 95.

the account, except for the two years of the incumbency of the former vicar, says, "the suit being thus confined, for what purpose should the vicar be made a party? It would be perfectly nugatory, for he ought not to be made a party to contest the right, and the object of a suit now is reduced to an account, in which he is not interested."

In a more recent case before Sir A. Hart, V. C., the propriety of requiring the impropriator to be a party to a suit by a vicar for tithes, was fully discussed, and his Honor expressed his opinion to be, upon the authority of the cases of *Williams* v. *Price*, and *Williamson* v. *Lord Lonsdale* (*h*) that they ought not to have been parties; and he grounded his opinion upon the very reasons adopted by the Lord Chief Baron, in those two cases, in the first of which he assigned as a reason, that no decree could be made against the impropriator; and in the second, that a bill for an account of tithes was a mere possessory bill. (*i*)

But whether it be or be not improper to make the impropriator a party to a bill for tithes by a vicar, yet if he is made a party, improperly or not, and does not think fit to demur, or by his answer to insist that he ought not to be made a party, or enter into the discussion, but chooses to join in an answer with the occupiers, and to suggest and prompt their defence, *the question [*324] becomes a very different one; and though no account can be decreed against him, yet it would be difficult to say that he may not be made to pay the costs. (*j*)

And so if a person not being an impropriator, but merely a portionist of tithes, should join in the defence of a suit on the ground of his title, and the defence should fail, he may be ordered to pay the costs, although there can be no other decree against him. (*k*)

It is to be observed here, that where a bill was filed by the lessees of a rector against the occupiers and lay impropriators in a neighbouring parish, for a portion of the great and small tithes in that parish, it was held, that the vicar of that parish ought to have been a party, as he might have been entitled to the small tithes; (*l*) it is submitted, however, that upon the principles before laid down, neither the rector nor the vicar were necessary parties.

It may be said, that the invariable practice of Courts of Equity, in requiring the heir-at-law to be a party to a suit in all cases where a will of real estate is sought to be established, is at variance with the rule above laid down, that persons claiming under titles inconsistent with those of the plaintiff, although they may be in a situation to sue the defendant, need not be made parties to a suit. The practice with regard to heirs-at-law, however, arises from the peculiar principle adopted by Courts of Equity in cases of wills relating to real estate, which they will not carry into effect till the due execution of the will has been either admitted by the heir or proved against him, for which purpose it is required that he should be made an adverse party. The case of an heir-at-law is therefore merely an exception to the general rule, and that it is so is evinced by the fact, that where a testator has made two wills, containing a different disposition of the same property, the former of which is unrevoked except by the subsequent will, it is not necessary, in a suit to establish the latter will, to make those claiming under the former will parties, though *they are equally [*325] interested in disputing the latter will as the heir. (*m*)

(*h*) *Ubi supra.* (*i*) Cooke v. Blunt, 2 Sim. 417.
(*j*) *Per* Lord Ch. B. Alexander, Wing v. Morrell, M'Clelland & Y. 625.
(*k*) Ibid. (*l*) Baily v. Worrall, Bunb. 115.
(*m*) Lord Red. 139. Lord Redesdale appears to think that in such cases the persons claiming under the prior will may, if their right is insisted upon, be made parties, for the purpose of quieting the title and of protecting those who may act under the orders of the Court in executing the latter instrument. *Sed vide* Devonsher v. Newenham; 2 Sch. & Lef. 211.

With respect to the practice above alluded to, of making the heir-at-law a party in suits relating to real estates by devisees and persons interested under a will, the necessity of adhering to it, where it is practicable, has been recognized in a great many cases. Therefore, where a motion was made on the part of a devisee to have some title-deeds which had been brought into Court delivered up to him, the Court refused to grant it, because the heir was not a party, nor had he notice, nor was the will established against him, though a recovery had been suffered under it. And so in a bill by creditors, to compel a sale of lands devised for the payment of debts, it is necessary that the heir should be a party, in order that the will may be established against him, as otherwise the estate might not sell for so much money.

And even where the suit is brought against the devisee, under the statute of fraudulent devises, (*n*) the heir-at-law is a necessary party. This, however, appears to have been decided merely upon the ground that the Act of Parliament which makes the devised estate assets, requires the heir to be made a defendant in an action at law, and a bill in equity in such case is no other than an action at law. (*o*) And in *Gawler* v. *Wade*, (*p*) Lord Cowper is reported to have said, that the rule is otherwise where there is no heir; and perhaps it might be otherwise too if the bill had charged that the plaintiff had made inquiry, and could discover no heir.

It seems, from the case of *Warren* v. *Stawell*, above referred to, that where a devisee is a bankrupt, the bill may be brought against the assignee and the heir-at-law, and that the bankrupt devisee need not be a party.

But although the heir-at-law is a necessary party to suits instituted for the purpose of making estates which have been *devised subject to the payment of debts, he is not a necessary party to suits instituted by [*326] creditors claiming under a deed whereby estates have been conveyed to trustees to sell for payment of debts, unless he is entitled to the surplus of the money arising from the sale.

Where it appeared that a trustee had been dead several years, and that the freehold lands had been quietly enjoyed under the will, a sale was declared without the heir being a party. (*p*)

It seems that in the case of a purchase under a decree made upon a bill of this description, the circumstances of the heir of the testator not having been before the Court when the decree was pronounced, although a good objection at the hearing, is not a ground of exception to the title; though if he be not made a party to the conveyance, it may be a good ground of objection to the conveyance when settled by the Master. (*q*)

Although it was formerly the practice, where the heir-at-law was abroad, or could not be found, to direct the execution of the trusts without declaring the will well proved, (*r*) yet it seems that now the Court will, upon due proof of the execution of the will, and of the sanity of the testator, declare the will well proved, notwithstanding the absence of the heir, if the fact is charged in the bill and proved; because directing the devised estate to be sold, is in effect establishing the will, and executing the trusts; and the heir-at-law, when he appears, must get rid of it as he can. (*s*)

And so the Court will declare the will proved upon hearing the evidence, where the heir-at-law, being a party, makes default.

(*n*) 3 & 4 W. & M. c. 14.
(*o*) Warren v. Stawell, 2 Atk. 125.
(*p*) 1 P. Wms. 99.
(*p*) Harris v. Ingledew, 3 P. Wms. 94.
(*q*) Wakeman v. The Duchess of Rutland, 3 Ves. 233.
(*r*) French v. Baron, 1 Dick. 138; 2 Atk. 120, S. C.; Stokes v. Taylor, 1 Dick. 349; Cator v. Butler, 2 Dick. 438; Braithwaite v. Robinson, ibid, n.
(*s*) Banister v. Way, 2 Dick. 599; *Vide acc.* Williams v. Whingates, 2 Bro. C. C. 399.

The evidence, however, used upon that occasion will be no evidence against the heir, if he should afterwards set up a claim; nor can the Court by such a decree, in any manner ensure the title under it against his rights. (t) It is to be [*327] observed here, that if no heir-at-law can be found, the Attorney *General is usually made a party to a bill for carrying the trusts of a devise of real estates into execution, on the supposition that the escheat is in the Crown, if the will set up by the bill should be subject to impeachment. If any person should claim the escheat against the Crown, that person may be a necessary party. (u)

The rule which has been before noticed, that persons claiming under titles which are inconsistent with that of the plaintiff, should not be made parties to a suit, even though they are in a situation to molest the defendant in the event of the plaintiff being unsuccessful in establishing his claim, is equally applicable to prohibit their being made parties as co-plaintiffs or as defendants. Thus in the case of the *Attorney General* v. *Tarrington*, (x) where an information and bill was exhibited in the Exchequer by the King's Attorney General, and the Queen Dowager and her trustees as plaintiffs, against the lessees of the Queen, of certain lands which had been granted to her by the Crown for her jointure, in respect of the breach of the covenants in their leases, it was held that the King and Queen Dowager could not join, because their interests were several: and so in the case of *Lord Cholmondeley* v. *Lord Clinton*, (y) where a bill was filed by two persons, one claiming as devisee, and the other as heir-at-law; and the question was, whether they could maintain a suit to redeem a mortgage, on the allegation "that questions having arisen as to which of them was entitled to the estate, they had agreed to divide the estate between them," Sir Thomas Plumer strongly expressed his opinion that the Court could not proceed on a bill so framed. In a subsequent case between the same parties, the title of the plaintiff was stated in the same way as in the first, and Lord Eldon, though he allowed the demurrer which was put in to the bill upon other grounds, expressed a very strong opinion, that two persons claiming the same thing by different titles, but averring that it is in one or the other of them, and each contending that it was in himself, could not join in a suit as co-plaintiffs. His Lordship said, "that the difficulty of maintaining a suit where there are [*328] two plaintiffs, *A. and B., and each asserting the title to be in him, is this, that if the Court decides that A. is entitled, and the defendants do not complain, how is B. as a co-plaintiff to appeal from that decree?"

In a recent case before the Master of the Rolls, (Sir C. C. Pepys) where a bill had been filed by the settlor in a voluntary settlement, for the purpose of avoiding the settlement, in which another person claiming as a purchaser, under the 27 Eliz. c. 4, against the parties entitled under the voluntary settlement, was joined as a co-plaintiff; his Honor held, that as the settlement was of personal property it was not within the statute, and that, consequently, the purchaser not having the protection of the statute, could not have a better title than the settlor from whom he purchased, but that if he had shown a good title in himself, he could have had no relief in that suit, having associated himself as a co-plaintiff with the settlor; it having been in several late cases decided, that under such circumstances, no decree can be made, although the plaintiff might, in a suit in which he was sole plaintiff, have been entitled to relief. (z)

The rule, that persons claiming under different titles cannot be joined as plaintiffs in the same suit, does not apply to cases where their titles, though

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(t) Lord Red. 140.
(u) Lord Red. 140.
(x) Hardres, 219.
(y) 2 Jac. & W. 135.
(z) Bill v. Cureton, 2 M. & K. 503.

distinct, are not inconsistent with each other. Thus, all the creditors of a deceased debtor, although they claim under distinct titles, may be joined as co-plaintiffs in the same suit, to administer the assets of the debtor, although it is not necessary that they should be so joined, as one creditor may sue for his debt against the personal estate, without bringing the other creditors before the Court. (*a*) The joining, however, of several creditors in the same suit, although it might save the expense of several suits by different creditors, might nevertheless, where the creditors are numerous, be productive of great inconvenience and delay by reason of the danger which would exist of continued abatements. Courts of Equity have therefore adopted a practice, which at the same time that it saves the expense of several suits against the same estate, obviates the risk and inconvenience to be apprehended from joining a great *number of individuals as plaintiffs, by allowing one or more [*329] of such individuals to file a bill on behalf of themselves and the other creditors upon the same estate, for an account and application of the estate of a deceased debtor, in which case the decree being made applicable to all the creditors, the others may come in under it and obtain satisfaction for their demands as well as the plaintiffs in the suit; and if they decline to do so, they will be excluded the benefit of the decree and will yet be considered bound by acts done under its authority. (*b*) It is matter rather of convenience than indulgence, to permit such a suit by a few on behalf of all the creditors, as it tends to prevent several suits by several creditors, which might be highly inconvenient in the administration of assets, as well as burthensome to the fund to be administered; for if a bill be brought by a single creditor for his own debt, he may, as at law, gain a preference by the judgment in his favour over the other creditors in the same degree, who may not have used equal diligence. (*c*)

The same principle applies where the demand is against the real as well as the personal assets, (*d*) because, strictly speaking, where an estate is liable to several incumbrances, or specialty debts, one incumbrancer, or specialty creditor, cannot sue without bringing the others before the Court, which, when the creditors are numerous, might be attended with great inconvenience and expense, (*e*) and it has been extended *to the case of creditors [*330]

(*a*) Anon. 3 Atk. 572; Peacock v. Monk, 1 Ves. 127.

(*b*) Lord Red. 135.

(*c*) Ibid. *Vide* Attorney General v. Cornthwaite, 2 Cox, 45; where it was admitted at the bar that where a single creditor files a bill for the payment of his own debt only, the Court does not direct a general account of the testator's debts, but only an account of the personal estate and of that particular debt, which is ordered to be paid in a course of administration; and all debts of a higher or equal nature may be paid by the executor, and allowed him in his discharge. *Vid etiam*, Gray v. Chiswell, 9 Ves. 123.

(*d*) Leigh v. Thomas, 2 Ves. 313.

(*e*) Although in this case one incumbrancer cannot sue without making the rest parties, yet it has been held that this is cured by a decree directing an account to be taken of all the mortgages and incumbrances affecting the estate. *Vide* Vin. Ab. tit. Party (B.) ca. 51. And in Martin V. Martin, Lord Hardwicke said, that on a bill for a sale for the satisfaction of a bond creditor, not only where it was on behalf of himself and others, but even when the bill was for the satisfaction of his own particular debt, the constant course of the Court was to direct an account of all the bond debts of the testator or intestate, with liberty to come for a satisfaction. *Vide* Seton on Decrees, 85. It seems, however, upon more recent authorities, that a single bond creditor cannot have any decree at all against the real estate. *Vide* Bedford v. Leigh, 2 Dick. 707; Johnson v. Compton, 4 Sim. 47. On a bill by a judgment creditor, not on behalf of himself and others, against the heir of the conusor, the Court will only direct a sale of the moiety. Stileman v. Andrews, 2 Atk. 477, 608, 610; Amb. 13, S. C.; Rowe v. Bant, 1 Dick. 150; Burroughs v. Elton, 11 Ves. 33; O'Gorman v. Comyn, 2 Sch. & Lef. 150. It is otherwise where there are more judgment creditors than one. Burroughs v. Elton, *supra*. So upon a bill by a single judgment creditor against

under a trust deed for payment of debts, a few of whom have been permitted to sue on behalf of themselves and the other creditors named in the deed, for the execution of the trusts, although one creditor could not, in that case, have sued for his single demand without bringing the other creditors before the Court. (*f*)

Upon the same principle, where the trust fund was to be distributed amongst the joint and separate creditors of a firm, a bill of this description was permitted by one creditor only, on behalf of himself and the other joint and separate creditors, although it was objected, that one at least of each class ought to have been brought before the Court. (*g*)

It is to be observed, that in suits for marshalling assets, simple contract creditors must be joined as plaintiffs, as well as creditors by specialty; for upon a bill by specialty creditors only, the decree would be merely for the payment of the debts out of the personal estate, and if that should not prove sufficient for the purpose, for the sale and application of the real estate. The right to call for such an arrangement of the property as will throw those who have debts payable out of both descriptions of estate upon the real estate, in order that the personalty may be left clear for those whose demands are only payable out of the personal estate, belongs to the simple contract creditors, who have an equity either to compel the payment of the specialty debts out of the real estate, or else to stand in the place of the specialty creditors, as against the real estate, for so much of the personal estate as they shall exhaust. It is proper, therefore, in bills of this nature, to file them in the names of a specialty creditor and [*331] of a creditor by simple *contract, on behalf of themselves and of all others the specialty and simple contract creditors.

By analogy to the case of creditors, a legatee is permitted to sue on behalf of himself and the other legatees, because, as he might sue for his own legacy only, a suit by one on behalf of all the legatees, has the same tendency to prevent inconvenience and expense, as a suit by one creditor on behalf of all creditors of the same fund. (*n*) For the same reason, where it has been sought to apply personal estate amongst next of kin, or amongst persons claiming as legatees under a general description, and it may be uncertain who are the persons answering that description, bills have been admitted by one claimant on behalf of himself and of others equally interested. (*o*)

But the right of a few to represent the whole is by no means confined to the instances of creditors and legatees; (*p*) and the necessity of the case has induced the Court, especially of late years, frequently to depart from the general rule, in cases where a strict adherence to it would probably amount to a denial of justice, and to allow a few persons to sue on behalf of great numbers having the same interest; (*q*) thus part of the proprietors of a trading undertaking, where the shares had been split or divided into 800, were permitted to maintain a suit on behalf of themselves and others, for an account against some of their co-partners, without bringing the whole before the Court, (*r*) because "it would have been impracticable to make them all parties by name, and there would be

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the conusor to set aside a fraudulent conveyance, the Court will only give relief as to a moiety; although it is otherwise where there are more creditors than one. Higgins v. York Buildings Comp., 2 Atk. 107. Where a bill has been filed by a single bond creditor to establish his claim against the real estate of his deceased debtor, the Court has permitted it to be amended by making it a bill "on behalf of himself and of the other specialty creditors." Johnson v. Compton, *ubi supra*.

(*f*) Corry v. Trist, Lord Red. 136.
(*g*) Weld v. Bonham, 2 S. & S. 91.
(*n*) Lord Red. 136.
(*o*) Ibid. 138.
(*p*) See 6 Ves. 779.
(*q*) Lord Red. 138.
(*r*) Chancey v. May, Prec. Ch. 592.

continual abatement by death and otherwise, and no coming at justice, if they were to be made parties;" and so where all the inhabitants of a parish had rights of common under a trust, a suit by one on behalf of himself and the other inhabitants was admitted; (s) and one owner of lands in a township has been permitted to sue on behalf of himself and the others to establish a contributory modus for all the lands there. (t) Upon the same principle a bill was allowed by the captain of a privateer on behalf *of himself and of all other the mariners and persons who had signed certain articles of agreement with the owners, for an account and distribution of the prizes made by the ship. (u) And in *Lloyd* v. *Loaring*, (x) Lord Eldon held, that some of the members of a lodge of freemasons, or of one of the inns of Court, or of any other numerous body of persons, might sustain a suit on behalf of themselves and the others for the delivery up of a chattel in which they were all interested. [*332]

In *Cockburn* v. *Thompson*, (y) which was the case of a bill filed by several persons on behalf of themselves and of all other proprietors of the Philanthropic Annuity Institution, &c., being an institution formed for the purchase of annuities for lives with the money subscribed, and providing that the number of members should not be increased above 50,000, a plea that a great number of persons, whose names were stated, were proprietors of the institution and ought to be parties to the suit, was over-ruled. In giving his judgment upon that case, Lord Eldon observes, "Lord Thurlow determined that the general principle requires a residuary legatee to bring before the Court all persons interested in the residue; but that admits of exception where it is not necessary or convenient that all should be before the Court, as in *Chancey* v. *May*, (z) and the case of the *Waterworks Company*. (a) If a residue had been left equally among all the individual members of those societies, upon the same ground of impracticability and inconvenience, it would be competent to some of them to file a bill on behalf of themselves and the others, though suing as residuary legatees. There are various other cases; a bill filed by a lord of a manor against some of his tenants, or *vice versâ* by tenants on behalf of themselves and the others, to establish some right, as a bill with regard to suit to a mill; (b) a bill against parishioners for tithes, or by some parishioners, to establish a modus; another class of cases is that of persons who, though not a corporation, have *the appearance of it; assurance societies, each being an insurer of the others, as though it is settled by the Act of Parliament, (c) that no persons beyond a certain number shall insure as a company, any number of persons may associate for the insurance of each other, all in effect participating as a partnership. It is evident, that if occasion should arise to resort here for an account, as it would be impossible to bring all persons interested, the suit must be against some being proprietors and accountable parties, instituted by some on behalf of all. This course was taken in the case of the *Widows' Charity*, by Lord Thurlow, (d) upon which I observed in the [*333]

(s) Blackham v. The Warden and Society of Sutton Coldfield, 1 Ch. Ca. 269. It has been doubted whether the Attorney General ought not to have been a party to that suit. *Vide* Lord Red, 137.

(t) Chaytor v. Trinity College, 3 Anst. 841.

(u) Good v. Blewitt, 13 Ves. 397. In that case the bill was originally filed by the captain in his own right, but was allowed to be amended by introducing the words, "on behalf of himself," &c.

(x) 6 Ves. 773.

(y) 16 Ves. 321.

(z) Prec. Ch. 592.

(a) City of London v. Richmond, 2 Vern. 421.

(b) Adair v. New River Company, 11 Ves. 444.

(c) Stat. 6 Geo. 1, c. 18, s 12.

(d) Pearce v. Piper, 17 Ves. 1–15.

late case of the *Bakers' Company*. The former arose upon an association of widows contributing to a fund to pay them annuities. When this fund proved insufficient, every subscriber who had not been a member long enough to become an annuitant, and the representatives of those who were dead, had an interest to state her title in order to recover her money; but that difficulty was overcome upon this principle, that it was better to go as far as possible towards justice than to deny it altogether. So as to partnerships, the Court will settle the account between those parties who are before it, and do all possible justice. The principle being founded in convenience, a departure from it has been said to be justifiable, where necessary, and in all these cases the Court has not hesitated to depart from it, with the view, by original and subsequent arrangement, to do all that can be done for the purposes of justice, rather than hold that no justice shall subsist among persons who may have entered into those contracts."

The practice adopted by the Court of permitting one or more persons to represent in a suit all who have similar interests, has been frequently recognized and acted upon in a variety of instances; but it is not to be considered as a general principle, that this course may be acted upon in all cases within the inconvenience which the adoption of this practice has been intended to avoid. Where a bill was filed by five persons, on behalf of themselves and the other shareholders in a joint stock association, not established by Act of Parliament, [*334] who had by deed assigned their shares to the plaintiffs, *and constituted the plaintiffs their attorneys to institute suits, &c., in order to give effect to their claim, but upon trust for themselves, Sir J. Leach allowed a demurrer, because the assignors were not parties, although it was stated in the bill that they were very numerous, and that naming them as parties on the record would, in all probability, render it impossible for the plaintiffs to obtain a decree in the cause. (*e*)

It is to be observed, likewise, that in order to enable a plaintiff to sue on behalf of himself and others who stand in the same relation with him to the subject of the suit, it must appear that the relief sought by him is beneficial to those whom he undertakes to represent, as in the case of *Gray* v. *Chaplin*, (*f*) where the object was to prevent the trustees under a Canal Act, from committing a breach of trust; and in *Attorney General* v. *Heelis*, (*g*) where the object was to avoid the payment of a rate, in which it was held that every person assessed had one common interest; but where it does not appear that all the persons intended to be represented are necessarily interested in obtaining the relief sought, such a suit cannot be maintained; thus it seems that one partner cannot file a bill on behalf of himself and other partners for a dissolution of the partnership; and so a shareholder in a joint stock company cannot file a bill on behalf of himself and others of the shareholders, to put an end to the concern. (*h*) Upon the same ground, where a plaintiff, being one of the subscribers to a loan of money to a foreign state, filed a bill on behalf of himself and all other subscribers to that loan, to rescind the contracts of subscription, and to have the subscription moneys returned, Lord Eldon held, that the plaintiff was not entitled in that case to represent all the other subscribers, because it did not necessarily follow that every subscriber should, like him, wish to retire from the speculation, and every individual must, in that respect, judge for him- [*335] self. (*i*) And upon *the same principle, one of the inhabitants of a district, who claimed a right to be served with water by a public

(*e*) Blain v. Agar, 1 Sim. 37.
(*f*) 2 S. & S. 267.
(*g*) 2 S. & S. 77.
(*h*) Van Sandau v. Moore, 1 Russ. 465.
(*i*) Jones v. Del Rio, 1 Turn. & R. 297, in which case the plaintiffs had each a separate right to sue, and Lord Eldon also held, that as the plaintiffs could not support their bill, suing on behalf of themselves and others having similar rights, they could not, having three distinct demands, file one bill.

company, cannot file a bill on behalf of himself and the other inhabitants, to compel that company to supply water to the district upon particular terms, because what might be reasonable with respect to one might not be so with regard to the others; (*k*) and in *Beaumont* v. *Meredith*, (*l*) where a friendly society, in the nature of a partnership, had been dissolved, and the funds divided amongst the members, but some of the members who were dissatisfied filed a bill on behalf of themselves and the others against the trustees, alleging that the partnership had not been legally dissolved, and praying that the trustees might replace the stock which had been sold out for the purpose of paying to the other members their shares of the funds, and made a motion that the defendants might pay into Court certain sums admitted by their answer to be in their hands, but which were merely their shares of the trust funds to which they had been found entitled upon the division; Lord Eldon refused to entertain the motion, on the ground that the plaintiffs had no right in such a case to sue on behalf of themselves and the others, but that they ought to bring all the others before the Court. Where, however, it is perfectly clear that the object of the suit is for the benefit of all the parties interested, a few may maintain a bill on behalf of themselves and the others, even though the majority disapprove of the institution of the suit. Thus where an act complained of was necessarily injurious to the common right, Sir J. Leach suffered a few of a large number of persons to maintain a suit on behalf of themselves and the others for relief against it, although the majority approved the act, and disapproved of the institution of the suit. (*m*) Upon the same principle, in *Small* v. *Attwood*, (*n*) a few shareholders of a joint stock company were permitted to maintain a suit on behalf of themselves and other shareholders, for the purpose of rescinding a contract it being manifest from the evidence that it was for the benefit of all the shareholders that the contract should be rescinded.

It is to be observed, that in all cases where one or a few *individuals of a large number, institute a suit on behalf of themselves [*336] and the others, they must so describe themselves in the bill, otherwise a demurrer or plea for want of parties will lie. Thus, where a part of a ship's crew appointed two of their number to be agents, and a bill was filed by such agents in their own name, and not on behalf of themselves and others, a demurrer was allowed for not having made the whole crew parties; (*o*) and where a bill was filed by three partners in a numerous trading company against the members of the committee for managing the trading concerns of the company, it was dismissed, because it was not filed by the plaintiffs "on behalf of themselves and the other partners not members of the committee;" (*p*) and so where certain persons describing themselves as the trustees for a numerous company, filed a bill for the specific performance of an agreement entered into by themselves, as trustees for the company, and the defendants demurred to the bill, the demurrer was allowed, because although it was not practicable to make all the members parties, the bill ought to have been filed by some of them on behalf of themselves and others, and it did not appear by the bill that the plaintiffs were even members of the society. (*q*) In *Hales* v. *Pomfret*, (*r*) Lord Chief Baron Richards said, that a bill alleged to be exhibited by *some* of the owners and occupiers, and not by *all* the owners and occupiers of lands within the parish, was incorrectly framed; (*s*) and that properly a bill to estab-

(*k*) Weale v. West Middlesex Waterworks, 1 J. & W. 370.
(*l*) 3 V. & B. 181.
(*m*) Bromley v. Smith, 1 Sim. 8.
(*n*) 1 Young, 407.
(*o*) Leigh v. Thomas, 2 Ves. 312.
(*p*) Baldwin v. Lawrence, 2 S & S. 18.
(*q*) Douglas v. Horsfall, 2 S. & S. 184.
(*r*) Daniell, Ex. Rep. 142.
(*s*) *Vide acc.* Woolaston v. Wright, 3 Anst. 801.

lish a modus should be brought by owners and occupiers, on behalf of themselves and of all other owners and occupiers of lands within the parish, and that the Ordinary should be a party.

It is to be observed, that the Court will sometimes allow a bill, which has originally been filed by one individual of a numerous class in his own right, to stand over at the hearing, in order to be amended by the introduction of the words, "on behalf of himself," &c.; thus in *Lloyd* v. *Loaring*, (*t*) where a demurrer was allowed because the parties affected to sue in a corporate capa-
[*337] city, leave was *given to amend, by making them sue in their individual rights, as members of a co-partnership, on behalf of themselves and the others; and so in a subsequent case of an information and bill, where the information was expressed to be at the relation of the relators named, on behalf of themselves and all the other parishioners of a certain parish, and the bill was only by those persons themselves, without the additional words, so that in the suit, considered as instituted by a bill, all parties necessary to be bound were not before the Court, Lord Eldon said, that even at the hearing he should give leave to amend, with reference to this point, what was evidently a mere slip. (*x*)

SECTION II.

Of necessary Parties to a Suit, in respect of their interest in resisting the Demands of the Plaintiff.

A PERSON may be affected by the demands of the plaintiff in a suit, either *immediately* or *consequentially*. Where an individual is in the actual enjoyment of the subject-matter, or has an interest in it, either in possession or expectancy, which is likely either to be defeated or diminished by the plaintiff's claims, in such cases he has an *immediate* interest in resisting the demand, and all persons who have such immediate interests are necessary parties to the suit; but there may be other persons who, though not immediately interested in resisting the plaintiff's demands, are yet liable to be affected by them *consequentially*, because the success of the plaintiff against the defendants who are immediately interested, may give those defendants a right to proceed against them, for the purpose of compelling them to make compensation, either in the whole or in part, for the loss sustained. These persons, therefore, as being *consequentially* liable to be affected by the suit, are also necessary parties to it; and the defendant against whom the immediate claim is made, may insist upon
[*338] their being brought before *the Court in the first instance, in order that the relief which he is entitled to against them, in the event of the plaintiff's success, may be awarded to him by the same decree, and a multiplicity of suits thereby avoided. The question, therefore, of who are necessary parties to a suit in respect to their interest in resisting the plaintiff's demands, resolves itself into two; namely, Who are necessary parties, first, in respect of their *immediate* interest? and *secondly*, in respect of their *consequential* interest?

I shall first proceed to consider who are necessary parties to a suit, in respect of their *immediate* interest in resisting the plaintiff's demand. And here it is

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(*t*) 6 Ves. 773.

(*x*) Attorney Gen. v. Newcombe, 14 Ves. 1. *Vide etiam*, Good v. Blewitt, *ubi supra*, p. 332; Johnson v. Compton, *supra*, p. 339, n.

to be observed, that where parties are spoken of as having an interest in the question, it is not intended to confine the definition to those only who are *beneficially* interested, but it is to be considered as extending to all persons who have any estate, either legal or equitable, in the subject-matter, whether such estate be beneficial to themselves or not.

Under this definition are included all persons who fill the character of trustees of the property in dispute. But the rule is subject to exception, where the party is in the situation of a mere naked trustee, without any estate vested in him, in which case he need not, in general, be made a party. Thus a broker or agent signing a contract in his own name for the purchase or sale of property, is not considered a necessary party to a bill for a specific performance of such contract against his principal. (*a*) And so, where a person having no interest in the matter joins with another who has, in a contract for sale, as where a man having gone through a fictitious ceremony of marriage with a woman, joins with her as her husband in an agreement to sell her property, he is not a necessary party to a suit to enforce the contract. (*b*)

In all cases, however, in which any estate is vested in an individual filling the character of trustee, or if he has no estate, where the circumstances are such, that in the event of the plaintiff succeeding in his suit, the defendant may have a demand over against him, he is a necessary party. Thus in *Jones* v. **Jones*, (*b*) where a plaintiff sought to set aside a lease on the ground of fraud, without bringing before the Court the trustees [*339] who were parties to the lease, and to whom the fraud was imputed, the objection for want of parties was allowed, because, if the plaintiff prevailed, the defendant might have a remedy over against the trustees. Upon the same principle, where the trustees of real estates had conveyed them over to purchasers, it was determined, that on a bill by the *cestui qui trusts* against the purchasers to set aside the conveyance, the trustees were necessary parties. (*c*)

A trustee, however, who is named in a will, but has never acted, and has released all his interest to his co-trustee, ought not to be made a party to a bill to set aside the will on the ground of fraud. (*d*)

Where a trustee has assigned his interest in the trust estate to another, it is necessary to have, not only the trustee who has assigned, but the assignee before the Court; thus, where a bill was filed by an annuitant to recover the arrear of his annuity, against the heir of the person in whom the estate, out of which the annuity was payable, was vested; and it appeared that the heir had assigned his interest in the estate to another, who was a mortgagee of the estate, and had paid the annuity down to a certain period, and had then stopped; it was held that the plaintiff ought to have made the assignee a party; by which means she would have gotten the mortgage deeds, and the Court would then have decreed the assignee to have paid the annuity, and the assignor to stand as a security for having broken the trust. (*e*)

If there be more trustees than one, they must all be parties if amenable to the process of the Court. (*f*) It seems, however, that in some cases where they are merely accounting parties, one may be sued for an account of his own receipts and payments, without bringing the others before the Court. (*g*) Thus, where a bill was filed against the representative of one of several trustees who were dead, for an account of the receipts and payments of his testator, who

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(*a*) Kingsley v. Young, Coop. Tr. Pl. 42; *vide ante*, p. 291.
(*b*) Sturge v. Starr, 2 M. & K. 195. (*b*) 3 Atk. 110.
(*c*) Harrison v. Pryn, Barnard, 324.
(*d*) Richardson v. Hulbert, 1 Anst. 65. (*e*) Burt v. Dennet, 2 Bro. C. C. 225.
(*f*) Vin. Ab. Party, B. 68.
(*g*) Lady Selyard v. The Executors of Harris, 1 Eq. Ca. Ab. 74.

[*340] alone managed the *trust, without bringing the representatives of the other trustees before the Court, and an objection was taken on that ground, the objection was over-ruled, because the plaintiff insisted only upon having an account of the receipts and disbursements of the trustee, whose representative was before the Court, and not of any joint receipts or transactions by him with the other trustees. And so, where a bill was filed by a creditor against the representatives of B. & C. as two trustees of estates conveyed in trust to pay debts, for an account of the produce of the sales and payment of their debts, and the representatives of B. alleged by their answer, that not only C. but D. also were trustees, and that D. had acted in the trust, although they did not know whether he had received any of the produce, Lord Kenyon, M. R., and afterwards Lord Arden, M. R., held D. to be an unnecessary party. The reporter of this case adds a query, because at the bar the general opinion was that D.'s representatives ought to have been parties, nor could one creditor suing, waive, on behalf of absent parties in joint interest with himself, the benefit or possible benefit of any part of the trust fund. (h) This query seems to be in accordance with the principles laid down in *Williams* v. *Williams*. (i) There is no doubt, however, that where a bill is against trustees guilty of a breach of trust, the representatives of all those trustees who were implicated in the breach of trust, must be parties, because, in the case of a decree against any of them, they may have a right to call upon the others to contribute

The rule which requires the trustees of property in litigation to be brought before the Court, requires the presence of the committees of the estates of idiots and lunatics in a suit against the idiots or lunatics committed to their care; (k) because, by the grant to them of the estates of such idiots or lunatics, they are constituted the trustees of such estates. Upon the same ground, the assignees of bankrupts or insolvents are necessary parties to suits relating to the property of such bankrupts or insolvents.

[*341] For the same reason, wherever a demand is sought to be *satisfied out of the personal estate of a person deceased, it is necessary to make the personal representative a party to the suit. Thus, although, as we have seen, a creditor or legatee may bring a bill against a debtor to the testator's estate upon the ground of collusion between him and the executor, (l) yet in all cases of this description, the personal representative must be before the Court. And so, where to a bill for an account of the estate of a person deceased, and to have the same applied to satisfy a debt alleged to be due from him to the plaintiff, the defendants pleaded that they were not executors or administrators of the party whose estate was sought to be charged, nor so stated by the bill, and demurred, for that the executors or administrators were the proper parties to contest the debt, who might probably prove that it had been discharged, the Court allowed both the plea and demurrer, but gave the plaintiff leave to amend his bill as he might be advised. (m)

Upon the same principle, the specific legatee of a term suing for the term, must make the executor a party, even though it is alleged in the bill that the executor had assented to the bequest. (n) Where, however, a bill was filed by the reversioner against the legatee of a term, praying that the lease might be declared void, and the defendant insisted, that if the lease was set aside, the

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(h) Routh v. Kinder, 3 Swan. 144 n.; from Lord Colchester's MSS.
(i) 9 Mod. 299. (k) Lord Red. 24; *ante*, p. 219.
(l) Attorney General v. Wynne, Mos. 126; *vide ante*, p. 293.
(m) Griffith v. Bateman, Rep. t. Finch, 334, *vide acc.* Rumney v. Mead, ibid. 303; Attorney General v. Twisden, ibid. 336.
(n) Moor v. Blagrave, 2 Ch. Ca. 277.

plaintiff ought to repay the money expended by the testator in the improvement of the premises, the executor of the testator, who had assented to the bequest, was not considered a necessary party to the suit. (*o*) And where an executor had been outlawed, and a witness proved that he had inquired after but could not find him, it was thought to be a full answer to the objection, that he was not a party to a suit which had been instituted by a creditor of the deceased testator against the residuary legatee. (*p*)

The rule which requires the executor to be before the Court in all cases relating to the personal estate of a testator, *extends to an executor *durante minore ætate*, even though the actual executor has attained twenty-one, and has obtained probate thereon: thus, where there has been an executor *durante minore ætate* of the daughter of a testator, and after the daughter attained twenty-one a bill was brought against her without making the executor *durante minore ætate* a party, although it was insisted that the daughter, being of full age, was complete executrix *ab initio*, and had the whole right of representation in her; yet it was held, that the representative *durante minore ætate* was a necessary party, and that for want of him the cause must stand over. (*q*) [*342]

It is to be observed, however, that if in the last case the daughter had received all the testator's personal estate from the hands of the executor *durante minore ætate*, upon an account between them, the objection for want of parties would have been over-ruled.

The personal representative required, is one resident in England, and where a testator appointed persons residing in India and Scotland his executors, and the will was not proved in England, but the plaintiff, a creditor, filed a bill against the agents of the executors, to whom money had been remitted, praying an account and payment of the money to the Accountant General for security, a demurrer, because no personal representative of the testator resident within the jurisdiction of the Court was a party, was allowed. (*r*)

It is to be observed, however, that where an executor who has proved a will in India, afterwards comes to England, and a suit is brought against him for an account of his receipts in India, it is not necessary that there should be before the Court a personal representative, appointed in this country; and where A., one of the executors of B., who died in India, proved the will there, and, having possessed assets in India, died in that country, upon which his widow, who was his executrix, proved his will in India, and thereby became the representative, not only of A., but of the original testator, B., upon the widow coming to this country, she was made a party to a suit for the administration of the estate of B., and *on an objection being taken that a personal representative of B. appointed by the Ecclesiastical Court here ought also to be a party, the objection was over-ruled. (*s*) [*343]

It seems, that where an administration is disputed in the Ecclesiastical Court, the Court of Chancery will entertain a suit for a receiver to protect the property till the question in the Ecclesiastical Court is decided, although an administration *pendente lite* might be obtained in the Ecclesiastical Court. (*t*) In such cases the rule requiring a representative to be before the Court, must be dispensed with, there being no person sustaining that character in existence. And

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(*o*) Malpas v. Ackland, 3 Russ. 273.
(*p*) Heath v. Percival, 1 P. Wms. 683. (*q*) Glass v. Oxenham, 2 Atk. 121.
(*r*) Lowe v. Farlie, 2 Mad. 101; *vide etiam* Logan v. Farlie, 2 S. & S. 284.
(*s*) Anderson v. Caunter, 2 M. & K. 763. For the method of obtaining limited or special administration where the executor is abroad, *vid ante*, p. 294.
(*t*) Atkinson v. Henshaw, 2 V & B. 85; Ball v. Oliver, ibid. 96.

where a party entitled to administer refuses to take out administration himself, and prevents any one else from doing so, he will not be allowed to object to a suit being proceeded with, because a personal representative is not before the Court. Thus in *D'Aranda* v. *Whittingham*, (*u*) where the heir of an obligor demurred to a bill by the obligee because the administrator of the obligor was not a party, the demurrer was over-ruled, because it appeared that he would not administer himself, and had opposed the plaintiff in taking out administration as the principal creditor; and in a case where the person entitled by law to administration did not take it out, but acted as if she had, receiving and paying away the intestate's property, an objection for want of parties, on the ground that there was no administrator before the Court, was over-ruled. (*w*)

Where there are several executors or administrators, they must all be made parties, even though one of them be an infant; (*x*) but this rule may be dispensed with, if any of them are not amenable to the process of the Court, (*y*) or if they have stood out process to a sequestration; and if an executor has not administered he need not be a party. (*z*) Thus, where there were four executors, one of whom alone proved and acted, and a bill was brought against that one, and he in his answer confessed that he had alone proved the will and [*344] acted *in the executorship, and that the others never intermeddled therein, it was said to be good. (*a*) In that case, however, if the executor who had proved had died, it would not have been sufficient to have brought his executor before the Court, because he would not have represented the original testator; the other executors would still have had the right to prove, even though they had renounced probate. (*b*) The record, therefore, would not have been complete without a new representative of the original testator.

Wherever an executor has actually administered, he must be made a party to a suit, although he has released and disclaimed. (*c*) But where a plaintiff filed a bill against one of two executors, and alleged in his bill that he knew not who was the other executor, and prayed that the defendant might discover who he was and where he lived, a demurrer for want of parties was overruled. (*d*) And in the case before referred to, where one of two joint executors was abroad, an account was decreed of his own receipts and payments. (*e*)

The rule requiring all the personal representatives of a deceased person to be before the Court, requires that where some of them are dead, and a complete account is sought, the representatives of those who are deceased should be before the Court, unless the plaintiff waives the account of the estate of the deceased representative, which however he is not entitled to do, where a defendant is interested in having it taken, as where a legacy is sought to be raised against the real estate, in which case the heir is entitled to call for a complete account of the personal estate, and to have it applied in case of the inheritance. (*f*)

If a bill is filed against a married woman, who is an executrix or administratrix, her husband must also be a party, unless he has abjured the realm. (*g*) In *Taylor* v. *Allen*, (*h*) however, Lord Hardwicke granted an injunction to [*345] restrain a wife, executrix, from getting in the assets, her husband *being in the West Indies, and not amenable to the process of the

(*u*) Mos. 84.
(*x*) Scurry v. Morse, 9 Mod. 89; Offey v. Jenny, 3 Ch. Rep. 92.
(*y*) Cowslad v. Cely, Prec. Ch. 83.
(*z*) Went. Off. Ex. 95.
(*a*) Brown v. Pitman, Gilb. Eq. R. 75; 16 Vin. Ab. tit, Parties, B. Pl. 19.
(*b*) Arnold v. Blencowe, 1 Cox, 426.
(*c*) Smithby v. Stinton, 1 Vern. 31.
(*d*) Boyer v. Covert, 1 Vern. 95.
(*e*) Cowslad v. Cely, Prec. in Ch. 83.
(*f*) Williams v. Williams, 9 Mod. 299.
(*g*) Lord Red. 30.
(*h*) 2 Atk. 213.
(*w*) Cleland v. Cleland, Prec. Ch. 64.

Court, on the ground, that if she wasted the assets, or refused to pay, a creditor could have no remedy, inasmuch as her husband must be joined as a party to the suit against her.

In *Bunyan* v. *Mortimer*, (*i*) where a bill had been filed against a husband and wife, in respect of a demand against the wife as executrix, and the husband, who was a bankrupt, after having appeared for himself and his wife, went abroad; whereupon an attachment had been issued against him for want of an answer; upon a motion for leave to issue an attachment against the wife for not answering, the Vice Chancellor, Sir J. Leach, said, that the proper course was, first to move that the wife may answer separately, and that notice of that motion must be given to the wife.

In a case before Lord Thurlow, where a bill had been filed for an account of the testator's estate, and it was objected that one of the executors was not a party; he was ordered to be introduced into the decree then made, as a party, and decreed to account before the Master, without putting off the cause to add parties. (*j*)

In *Kilby* v. *Stanton*, (*k*) two executors were appointed, one proved and the other declined to act, an action was commenced by the acting executor against the debtor to the testator; and the rule of law requiring all the executors to join, the action was brought in the name of both executors. On a bill filed by the debtor, he obtained the common injunction for want of an answer, which went of course against both the plaintiffs at law. The acting executor subsequently put in an answer, and on an affidavit that the other executor, who resided abroad, refused to act, or to put in any answer, the Court granted an order *nisi* to dissolve the injunction.

It seems that where a power of sale is given, by a will, to executors, and they renounce probate, they will not be considered necessary parties to the suit; thus, where a testator had devised that his executors should sell his land, and be possessed of the money arising from the sale upon certain trusts *mentioned in his will, and made B. and C. his executors, who [*346] renounced; whereupon administration, with the will annexed, was granted to one of the plaintiffs, upon a bill brought by the *cestui qui trust* of the purchase-money, under the will, against the heir to compel him to join in a sale of the lands; it was objected that there wanted parties, in regard that the executors ought to have been made defendants, for notwithstanding they had renounced, yet the power of sale continued in them, and the objection was over-ruled, there being only a power and no estate devised to them. (*l*)

It should be noticed, that a query has been added to the decision upon this point by the reporter, and the doubt suggested appears to be justified by the opinion expressed both by Sir Edward Sugden and Mr. Preston, viz: that where a power is given to executors they may exercise it, although they renounce probate to the will. (*m*) It is to be observed, however, that in the case of *Keates* v. *Burton*, (*n*) referred to by Sir Edward Sugden (which was a case of a power given by a testator to his trustees and executors, one of whom died, and the other renounced,) Sir William Grant remarked, "that the power is given to the executors, but they have not exercised it, and they have renounced the only character in which it was competent to them to exercise it." (*o*)

(*i*) Mad. & Geld. 278.

(*j*) Pitt v. Brewster, 1 Dick. 37. It is presumed that he appeared, and consented to this order.

(*k*) 2 Young & J. 75.

(*l*) Yates v. Compton, 2 P. Wms. 308.

(*m*) Sugden on Powers, 174, 4th ed.; 2 Prest. on Abst. 264.

(*n*) 14 Ves. 434.

(*o*) *Vide* 1 Williams on Executors, 156.

It is right in this place to recall the attention of the reader to the rule which has been before noticed, that the executor or administrator of a deceased person, is the person constituted by law to represent the personal property of that person, and to answer all demands upon it; and that, therefore, where the object of a suit is to charge such personal estate with a demand, it is sufficient to bring the executor or administrator before the Court; (*p*) thus it has been held, that in a bill to be relieved touching a lease for years, or other personal duty against executors, though the executors be executors in trust, yet it is not necessary to make the *cestui qui trusts* or the residuary legatees parties. (*q*) [*347] And where a bill was filed by *creditors against an executor without making the residuary legatee a party, Lord Loughborough, though he at first thought that the legatee ought to have been a party, eventually made the decree without him, observing that it was an anomalous case in a Court of Equity, where all parties who are interested are to be before the Court. (*r*) And so where a bill was filed against an executor, to compel the transfer of a sum of stock belonging to his testatrix, and the executor, by his answer, stated that the residuary legatees claimed the stock, the objection for want of parties was held to be untenable. (*s*)

In like manner, where a testator gave different legacies to three, and they were to abate or increase according as the personal estate fell short or exceeded; in a bill against the executor by one legatee, the executor pleaded that the other legatees ought to be parties, because the account made with the plaintiff would not conclude them, and he should be put to several accounts, and double proof and charge, the plea was over-ruled. (*t*) It seems, however, that where a person has a *specific lien* upon the property in dispute, he must be brought before the Court; and upon this ground it was held, that as the specific devisee of a mortgage could not be bound by an account between the mortgagor and the representatives of the mortgagee his testator, he must be a party to a bill to redeem by mortgagor. (*u*) And so where a husband had specifically disposed of his wife's paraphernalia to other persons, on a bill by the wife against the executor for a delivery of them to her, the specific legatees were considered necessary parties. (*x*)

The assignees of a bankrupt or insolvent debtor are also, as has been before stated, the proper parties to represent the estates vested in them under the bankruptcy or insolvency, and therefore, in all cases where claims are sought to be established against the estates of a bankrupt or an insolvent debtor, it is necessary to bring only the assignees before the *Court, and the bankrupts or insolvents themselves, or their creditors, are unnecessary parties. (*y*) Thus it has been held, that a bankrupt is not a necessary party to a bill of foreclosure against his assignees, (*z*) and Sir John Leach, M. R., when he was Vice Chancellor, allowed a demurrer, put in by a bankrupt who was made a party to a bill of foreclosure against his assignees, even though there had been no bargain and sale executed by the commissioners. (*a*) It is to be observed, however, that where fraud and collusion are charged between the [*348]

(*p*) Lord Red. 135.
(*q*) Anon. 1 Vern. 261; 1 Eq. Ca. Ab. 73, Pl. 13.
(*r*) Lawson v. Barker, 1 Bro. 303; Love v. Jacomb, ibid.
(*s*) Brown v. Dowthwaite, 1 Mad. 447.
(*t*) Haycock v. Haycock, 2 Ch. Ca. 124.
(*u*) Langley v. Earl of Oxford, Amb. 17. *Sed vide* Mr. Serjeant Hill's note of this case, in Mr. Blunt's edition of Ambler, Appendix C.
(*x*) Northey v. Northey, 2 Atk. 77. (*y*) Collet v. Wollaston, 3 Bro. C. C. 228.
(*z*) Adams v. Holberte, Har. Ch. P. 30; Bainbridge v. Pinhorn, 1 Buck. 135.
(*a*) Lloyd v. Lander, 5 Mad. 288.

bankrupt and his assignees, the bankrupt may be made a party, and he cannot demur, although relief be prayed against him. Thus, where a creditor, having obtained execution against the effects of his debtor, filed a bill against the debtor, against whom a commission of bankrupt had issued, and the persons claiming as assignees under the commission, charging that the commission was a contrivance to defeat the plaintiff's execution, and that the debtor having, by permission of the plaintiff, possessed part of the goods which had been taken in execution for the purpose of sale, instead of paying the produce to the plaintiff, had paid it to his assignees, a demurrer by the alleged bankrupt, because he had no interest and might be examined as a witness, was over-ruled. (*b*)

Subject to the above exceptions, and to the rules hereafter referred to with regard to real estates, the rule is, that all *cestui qui trusts* are necessary parties to suits against their trustees, by which their rights are likely to be affected. Thus, on a bill for redemption, the defendant in his answer set forth that he was a trustee for A., it was objected to the plaintiff at the hearing, that the *cestui qui trust* should have been made a party, and because it was disclosed in the answer, and he might have amended, the bill was dismissed. (*c*) And so in a bill against the heir of a mortgagee to redeem, the personal representative must be a party, because he is the person entitled to the mortgage-money, and the heir is only a trustee of the legal estate for him.

*In some cases, however, where the *cestui qui trusts* are very numerous, the necessity of bringing them all before the Court has been dispensed with. Thus, where upon a bill brought against an assignee of a lease to compel him to pay the rent, and perform the covenants, it appeared that the assignment was upon trust for such as should buy the shares, the whole being divided into 900 shares, and an objection was taken because the shareholders were not parties; the objection was over-ruled, as the assignees by dividing the shares, had made it impracticable to have them all before the Court. (*d*) Upon the same ground, the trustees of real estates, for payment of debts or legacies, are considered sufficient to defend a suit, without bringing before the Court the creditors or legatees for whom they are trustees. (*e*) [*349]

This exception to the general rule will not, however, apply to cases where a mortgagee seeks to foreclose the equity of redemption of estates which are subject to such trusts; thus, where the equity of redemption of an estate mortgaged in fee had been conveyed to trustees, upon trust, to sell and pay off incumbrances, and to divide the surplus amongst persons specified in the deed, it was held that the *cestui qui trusts* were necessary parties, (*f*) although his Honor appears to have been of opinion that a suit for a sale might have been maintained without them, as there was a declaration in the deed, that the receipt of the trustees should be a sufficient discharge to the purchaser, which his Honor considered as a declaration, that in case of a sale the presence of the parties beneficially interested shall not be necessary; and there appears no doubt, that under such a deed, without a clause of that nature, the *cestui qui trusts* of the purchase-money must be parties to a bill for the specific performance of a contract for the sale by the trustees. (*g*) And in a case in the Court of Exchequer, where there was a devise to trustees to sell, and, after payment of debts and legacies, to divide the surplus amongst several persons, and a bill

(*b*) King v. Martin, 2 Ves. J. 641, cited Lord Red. 132.
(*c*) Whistler v. Webb, Bunb. 53.
(*d*) City of London v. Richmond, 2 Vern. 421. *N. B.* In that case the original lessee was considered a necessary party.
(*e*) Lord Red. 142 *ante*.
(*f*) *Vide etiam* Osbourn v. Fallows, 1 R. & M. 741.
(*g*) Calverley v. Phelp, Mad. & Geld. 231.

[*350] was filed by a person interested *in the surplus, to have his share paid to him, it was held, that all the persons interested in the fund must be parties, although the estates had been sold before the bill was filed. (h) It is, however, to be observed, that to a suit for the execution of a trust by or against those claiming the ultimate benefit of such trust, after the satisfaction of prior charges, it is not necessary to bring before the Court the persons claiming the benefit of such prior charges; and, therefore, to a bill for application of a surplus, after payment of debts and legacies, or other incumbrances, the creditors, legatees, or other incumbrancers, need not be made parties. And persons having demands prior to the creation of such a trust, may enforce these demands against the trustees, without bringing before the Court the persons interested under the trust, if the absolute disposition of the property is vested in the trustees. But if the trustees have no such power of disposition, as in the case of trustees to convey to certain uses, the persons claiming the benefit of the trust must also be parties. Persons having specific charges on the trust property are also necessary parties; but this will not extend to a general trust for creditors or others, whose demands are not specified in the creation of the trust, as their number, as well as the difficulty of ascertaining who may answer a general description, might greatly embarrass a prior claim against a trust property. (i)

Where, however, the demands and names of the creditors, although not actually specified at the time of the creation of the trust, are subsequently ascertained by their signing a schedule to the conveyance, they will become necessary parties, thus where a plaintiff claiming an annuity charged upon an estate which had subsequently been demised to trustees for the benefit of such of the grantee's creditors as should execute the conveyance, filed a bill, against the grantor and the trustees, and one of the creditors who had executed the deed, and who had obtained a decree in an original suit, instituted by him on behalf of himself and all other the creditors under the trust-deed, praying an account [*351] of what was due to him, and *that the priorities of himself and the other creditors might be ascertained, and that he might redeem the securities which were prior to his own, and have the benefit of the decree as to that part of his demand for which he should not be entitled to priority over the trust-deed; it was held by the Vice Chancellor, that all the creditors who had executed the trust-deed were necessary parties; and that, as it was stated in the bill that several of the creditors had executed the deed, and only one was made a party, the defect appeared sufficiently on the face of the bill to entitle the defendant to take advantage of it by demurrer. (k)

Where the money secured by a mortgage is subject to a trust, a mortgagor, or any person claiming under him, seeking to redeem the mortgage, must make all persons claiming an interest in the mortgage money parties to the suit. Thus, where it appeared that the parties against whom the redemption was prayed were trustees for a woman and her children, the Lord Chief Baron held, that the *cestui qui trusts* were necessary parties to the suit; although under the peculiar circumstances of the case, and to avoid delay and expense, he recommended that a petition should be presented on their behalf, praying that their interests might be protected, and directed the cause to stand over for that purpose. (l) And in general it may be laid down as a rule, that there can be no foreclosure nor redemption unless all the parties entitled to the mortgage money are before the Court. (m) Therefore, where a mortgagee had assigned the mortgage upon certain trusts for the benefit of his family, the mortgagee, the

(h) Faithful v. Hunt, 3 Anst. 751. (i) Lord Red. 142.
(k) Newton v. Earl of Egmont, 4 Sim. 574; *vide etiam* 5 Sim. 130, S. C., S. P.
(l) Drew v. Harman, 5 Price, 319.
(m) Palmer v. Earl of Carlisle, 1 S. & S. 423.

trustees, and the *cestui qui trusts*, were considered necessary parties to a bill to redeem. (*n*) And so where a mortgage term had been bequeathed to trustees, upon trust, to sell and apply the produce among the testator's twelve children and a grandchild *nominatim;* it was held, that all the *cestui qui trusts*, interested in the produce of the term, were necessary parties, although they were numerous, and the property small, *and although the trustees had power to give a discharge to purchasers. (*o*) [*352]

But where a mortgagee, who has a plain redeemable interest, makes several conveyances upon trust, in order to entangle the affair, and to render it difficult for a mortgagor, or his representatives, to redeem, there it is not necessary that the plaintiff should trace out all the persons who have an interest in *such trust*, to make them parties: the persons having the legal estate, however, must be before the Court, and where a mortgagee in fee has made an absolute conveyance with several limitations and remainders over, the decree cannot be complete without bringing before the Court, at least the first tenant in tail, and *those having intermediate estates.* (*p*) It seems that where a mortgage is forfeited, and the mortgagee exercises the legal rights he has acquired by disposing of, or encumbering the estate, and the mortgagor comes for the redemption, which a Court of Equity gives him, it must be upon the terms of indemnifying the mortgagee from all costs arising out of his legal acts; upon this principle, Sir John Leach, in the case of *Wetherell* v. *Collins*, above referred to, ordered the mortgagor to pay the costs of the trustees, and *cestui qui trust*, who were necessarily brought before the Court in consequence of the assignment of the mortgagee.

It seems formerly to have been considered necessary, that a mortgagee, who had assigned his mortgage, should be made a party to a bill of redemption, (*q*) but the law upon the point appears now to be otherwise; and it has been determined, that where there has been an assignment, even though it was made without the previous authority of the mortgagor, or his declaration, that so much is due, *the assignee is the only necessary party;* (*r*) for whatsoever the assignee pays without the intervention of the mortgagor, he can claim nothing under the assignment but what is actually due between the mortgagor and mortgagee. (*s*) Where a mortgagor is a party to an assignment of a mortgage by the mortgagee, then it is in fact a *new mortgage between the mortgagor and the assignee, and of course the original mortgagee is not a necessary party to a bill, to redeem a mortgagor, however, cannot be bound by any transaction which may take place between a mortgagee and his assignee without his privity; if therefore, the mortgagee, before assignment, has been in possession, and has received more on account of the rents and profits than the principal and interest due upon the mortgage, and a bill is filed by the mortgagor against the assignee to have an account of the overplus, he may make the mortgagee a party to the bill, because he is clearly accountable for the surplus rents and profits received by himself. But upon the principles laid down by Lord Eldon, in the preceding case, (*t*) it would seem, that even in that case the assignee only would be sufficient, because, having contracted to stand in the place of the original mortgagee, he has rendered himself liable to have the account taken from beginning to end, and must be answerable for the result. [*353]

From the same case it appears, that although there may have been twenty

(*n*) Wetherell v. Collins, 3 Mad. 255. (*o*) Osbourn v. Fallows, 1 R. & M. 741.
(*p*) Yates v. Hambly, 2 Atk. 238.
(*q*) Anon. in the Duchy, 2 Ex. Ca. Ab. 594, Pl. 3.
(*r*) Chambers v. Goldwin, 9 Ves. 269. (*s*) Ibid. 265.
(*t*) Chambers v. Goldwin, 9 Ves. 268, 269.

mesne assignments, the person to whom the last has been made is the only *necessary* party to the redemption, (*u*)

Where, however, there are several derivitive mortgages, if the mortgagor seeks to redeem the first, he must make all the subsequent mortgagees parties, because they are all interested in the account. (*x*)

The rule which requires that all *cestui qui trusts* should be before the Court in suits relating to trust property, applies to resulting trusts as well as others.

Thus, where there is a grant or devise of a real estate, either by deed or will, and the whole equitable interest is not thereby granted or devised, there will be a resulting trust for the grantor or his heir; and in such case it will be necessary, in a suit relating to that estate, to bring the grantor or his heir before the Court.

Upon this principle it has been held, that in cases of charities, where a private founder has appointed no visitor, his heir-at-law is considered a necessary party to an information for the regulation of the charity, because in such case the heir-at-law *of a private founder is considered as the visitor. [*354] But in a case of this description, the Court refused to dismiss the information because of his absence, and directed an inquiry for him to be made by the master; (*y*) and so in the case of a charity, wherever it is doubtful whether the heir is disinherited or not, he must be a party. (*z*)

Wherever a real estate is to be recovered, or a right is sought to be established, or a charge raised against real estate, it is necessary that the person or persons entitled to the inheritance, should be before the Court. Upon this principle it is, that in a bill by a specialty creditor, to obtain payment of his demand out of the real estate of his debtor, the heir, as well as the executor, is a necessary party. Where, however, the arrears of an annuity, charged upon real estates, are sought to be recovered, if the arrears are such only as were due in the lifetime of the ancestor, it will be sufficient to make his personal representative a party, but for any arrears after his death, the heir must be a party. (*a*)

The same rule applies to all cases where the jurisdiction is drawn from the Courts of Common Law, in order to establish a right against a person having a limited estate in land or other hereditaments; and it is in such cases always held necessary to have the owner of the inheritance before the Court. Thus, where a bill was filed to establish a custom whereby the owners and occupiers of certain lands were obliged to keep a bull and a boar for the use of the inhabitants of the parish, it was held that a custom which binds the inheritance of lands can never be established in a Court of Equity unless the owners of the inheritance are parties, and that the master and fellows of Queen's College, who were the owners, ought to have been there. (*b*) And so, where a man prefers a bill to establish a modus against a lessee of an impropriator, he must make the owner of the impropriation a party; for this Court will not bind the inheritance of any person, unless such person is a party. (*c*) *Upon [*355] the same principle, where a bill is filed to establish a modus, or customary payment, against an ecclesiastical rector, the patron and ordinary are necessary parties, (*d*) the former because the right of presentation which belongs to him would be affected by the decree, the latter because his presence in the

(*u*) Ibid.
(*x*) Hobart v. Abbot, 2 P. Wms. 643, *ante*, p. 287.
(*y*) Attorney General v. Gaunt, 3 Swan. 148 n.
(*z*) Attorney General v. Green, 2 Bro. C. C. 495.
(*a*) Weston v. Bowes, 9 Mod. 309. (*b*) Spendler v. Potter, Bunb. 181.
(*c*) Glanvil v. Trelawney, Bunb. 70. (*d*) Gordon v. Simpkinson, 11 Ves. 509.

suit protects the right of the church against collusion. (e) In *Hales* v. *Pomfret*, (f) Lord Chief Baron Richards said that he had never known an instance of a bill to establish a modus, to which the ordinary was not a party, being brought to a hearing without its being ordered to stand over for the purpose of making him a party by amendment. (g) Upon the same ground, where a bill was filed to establish a modus against a dean and chapter, as impropriators, the ordinary and patron were considered necessary parties. (h)

It is to be observed, that to render the owner of the inheritance necessary, the object of the suit must be to bind the inheritance; if that is not the case, and the relief sought is merely against the present incumbent, the owner of the inheritance, if made a party, may demur; (i) and so, if in a bill for an account of tithes against an occupier, the owner of the land is made a party, (k) he is entitled to have the bill dismissed against him, though, if he mixes in the defence, &c., the dismissal will be without costs. (l)

It seems, from the judgment of the Court of Exchequer, as delivered by Sir William Alexander, C. B., in the case of *Day* v. *Drake*, (m) that a parson suing for tithes may, if he please, make the owner as well as the occupier of the land in respect of which the tithe is claimed, a party to the suit, although the occupier could not have insisted that, of necessity, he ought to have been brought before the Court. It must depend, however, upon a great variety of circumstances what the effect of making him a party may be; (n) and if the *person claiming tithes chooses to make the land owner a party, he must do it at the hazard of not receiving the costs, though he should [*356] get a decree against the occupier, or of paying them, according to the circumstances of the case. In the above case of *Day* v. *Drake*, the owner having been made a party to the suit, on the allegation that he had got certain documents into his possession, from his tenants and other persons, for the purpose of preventing the plaintiff from obtaining evidence from them in support of his demand, had put in a demurrer to the discovery sought by the bill, and the demurrer was over-ruled, on the ground that the owner ought to have denied the allegations in the bill. The owner afterwards put in a less extensive demurrer to that part of the bill which required a discovery from him as to his title, &c., and an answer denying the allegations that he had taken possession of the documents, &c., for the purpose of preventing the plaintiff from obtaining evidence in support of his claim against the occupiers; and the second demurrer was, upon argument, also over-ruled, principally upon the ground above stated, viz: that a person suing for tithes has a right, if he choose to incur the risk, to make an owner a party to the suit, although the defendant has no right to insist upon his being so.

It is to be observed, however, that although, in a bill by a party entitled to tithes, he may make the owner as well as the occupier a party, yet if the party entitled, sue only in the character of lessee, the occupier has no right to file a cross bill against the lessor for a discovery and production of documents, and that a demurrer to a bill of this nature was allowed. (o)

(e) Cook v. Butt, Mad. & Geld. 53. (f) Daniell, Ex. Rep. 142.

(g) As to making an improprietor a party to a bill for tithes by a vicar, or a vicar a party to a bill by an improprietor, *vide ante*, p. 320.

(h) De Whelpdale v. Milburn, 5 Price, 485.

(i) Williamson v. Lord Lonsdale, Daniell's Ex. Rep. 171, *ante*.

(k) Ibid. (l) Markham v. Smith, 11 Price, 126.

(m) 3 Sim. 64, 82.

(n) *Vide* Petch v. Dalton, 8 Pri. 9; Leathes v. Newitt, 8 Pri. 562; Bennett v. Skeffington, 4 Pri. 143; Markham v. Smith, *ubi supra*.

(o) Tooth v. The Dean and Chapter of Canterbury, 3 Sim. 49.

Where the object of a bill is to establish a right to the payment of a certain gross sum in lieu of the tithes of a certain portion of land, the owner as well as the occupier is necessary, though it seems that in a case of this description, where the object of the bill was to establish a right to the payment of 40*l.* per annum, which had been decreed in the time of Charles the First (*p*) out of particular lands; it was held not necessary to make the occupiers parties, because, although the decree in such case could only be against the land owners [*357] who *were before the Court, yet that would affect lands. And it was decreed that a commission should go to inquire into and ascertain the value of the lands, the owners and occupiers' names and what proportion of the 40*l.* per annum each tenement ought to pay.

In the case of *Penn* v. *Lord Baltimore*, (*q*) which was a suit for a specific performance of an agreement respecting the boundaries of two provinces in America, it was considered unnecessary to make the planters, tenants, or inhabitants within the districts, parties to the suit. The objection taken was upon the ground that their privileges, and the tenure and law by which they held, might not be altered without their consent; but Lord Hardwicke over-ruled the objection, saying, "Consider to what this objection goes, in lower instances; in the case of manors and honors in England which have different customs and bye-laws frequently; yet, though different, the boundaries of these manors may be settled in suits between the lords of these manors without making the tenants parties, or may be settled by agreement, which this Court will decree, without making the tenants parties; though in case of fraud, collusion, or prejudice to the tenants, they will not be bound."

And, in general, it may be stated as a rule, that occupying tenants under leases, or other persons claiming under the possession of a party whose title to real property is disputed, are not deemed necessary parties; though if he had a legal title, the title which they may have gained from him cannot be prejudiced by any decision on his rights in a Court of Equity in their absence; and though, if his title was equitable merely, they may be affected by a decision against that title. Sometimes, however, if the existence of such rights is suggested at the hearing, the decree is expressly made without prejudice to those rights, or otherwise qualified according to circumstances. If, therefore, it is intended to conclude such rights by the same suit, the persons claiming them must be made parties to it; and where the right is of a higher nature, as a mortgage, the person claiming, as we have seen, is usually made a party. (*r*) [*358] *And where a tenant in common had demised his undivided share for a long term of years, the lessee was held a necessary party to a bill for a partition, because he must join in the conveyance, and his lessor was ordered to pay his costs. (*s*)

The same principle which renders it necessary that the owner of the inheritance should be before the Court in all cases in which a right is to be established against the inheritance, requires that in cases where there is a dispute as to whether land in the occupation of a defendant is freehold or copyhold, the lord of the manor should be a party. Thus, where a plaintiff, by his bill, pretended a title to certain lands as freehold, which lands the defendant claimed to hold by copy of court roll to him and his heirs, and prayed in aid the lord of the manor; but, nevertheless, the plaintiff served the defendant with process to rejoin, without making the lord of the manor a party; it was ordered that the plaintiff

(*p*) Cuthbert v. Westwood, Gilb. Eq. Rep. 320; Vin. Ab. tit. Party, B. fol. 255, Pl. 58.
(*q*) 1 Ves. 444–9.
(*r*) Lord Red. 142.
(*s*) Cornish v. Gest, 2 Cox, 27.

should proceed no more against the defendant before he should have called the lord in process. (*t*)

For a similar reason it is held, that where a bill is brought for the surrender of a copyhold for lives, the lord must be made a party; because, when the surrender is made, the estate is in the lord, and he is under no obligation to regrant it; but it is otherwise in the case of copyholders of inheritance, there the lord need not be a party.

It may be observed in this place, that the same rule which has been before laid down, (*u*) with regard to the persons to be made parties as being interested in the inheritance of an estate, prevails equally in the case of adverse interests, as in that of concurrent interests with the plaintiffs; this rule is, that wherever the inheritance to a real estate is the subject-matter of the suit, the first person in being who is entitled to an estate of inheritance in the property, and all others having intermediate interests, must be defendants. Thus it is held necessary, in order to obtain a complete decree of foreclosure, in cases where the equity of redemption is the subject of an *entail, that the first *tenant in tail* [*359] of the equity of redemption should be before the Court. (*w*)

It appears to have been held formerly, that a decree of foreclosure against a tenant for life would bar a remainder-man, (*x*) but it is now settled, that not only the tenant for life, but the person having the next vested estate of inheritance, must be parties; (*y*) and the same rule applies to all cases where a right is to be established, or a charge raised against real estates which are the subject of settlement.

A plaintiff, however, has no right to bring persons in the situation of remainder-men before the Court in order to bind their rights, upon a discussion whether a prior remainder-man, under whom he claims, had a title or not, merely to clear his own title as between him and a purchaser. This was decided in *Pelham* v. *Gregory*, (*z*) before Lord Northington; in which case the question arose on the title to certain leasehold estates, which were limited in remainder, after limitations to the Duke of Newcastle and his sons, to the first and other sons of Mr. Henry Pelham in tail, and to which the plaintiff, Lady Catharine Pelham, claimed to be absolutely entitled on the death of the Duke, as administratrix to Thomas Pelham, the son of Mr. Henry Pelham, the first tenant in tail who had come into being. The plaintiff, in order to have this question decided against Lord Vane and Lord Darlington, who were subsequent remainder-men in tail, contracted to sell the estate, subject to the Duke's life estate, and to the contingency of his having sons, to the defendant Gregory, and brought a bill against him for a specific performance, to which she made Lord Vane and Lord Darlington parties; but Lord Northington dismissed the bill with respect to Lord Vane and Lord Darlington, and the reason his Lordship gave for dismissing the bill against the two latter, as expressed in his decree, was, "that they being remainder-men after the death of the Duke of Newcastle, if he should die without issue, their claims were not within his cognizance to determine, and the plaintiff had no right to *bring them into discussion in a Court [*360] of Equity." From this decree there was an appeal to the House of Lords, and although they decreed Gregory to perform his contract, they affirmed the dismissal against Lord Vane and Lord Darlington. In *Devonsher* v. *Newenham*, (*a*) Lord Redesdale, after stating the above case and decision, says, "I take this to be a decisive authority, and, if the books were searched, I have no

(*t*) Cited in Lucas v. Arnold, Cary. Rep. 81, 82; Vin. Ab. tit. Party, B. 254, Pl. 46.
(*u*) *Ante*, p. 316. (*w*) Reynoldson v. Perkins, Amb. 564.
(*x*) Roscarrick v. Barton, 1 Ch. Ca. 217. (*y*) Sutton v. Stone, 2 Atk. 101.
(*z*) 1 Eden. 518; 5 Bro. P. C. 435, S. C.
(*a*) 2 Sch. & Lef. 210.

doubt many other cases might be found where bills have been dismissed on this ground."

The owner of the first estate of inheritance, however, is sufficient to support the estate, not only of himself, but of every body in remainder behind him; (*b*) therefore, where a tenant in tail is before the Court, all subsequent remainder-men are considered unnecessary parties. This is by analogy to the rule at law, according to which there is no doubt that a recovery in which a remainder-man in tail was vouched, might bar all remainders behind. (*c*)

But although where there is a clear tenancy in tail, there is no occasion for a subsequent remainder-man being a party to a bill of forclosure, yet where it is doubtful whether a particular party has an estate tail or not, the person who has the first undoubted vested estate of inheritance ought to be a party. (*d*)

It is necessary, however, in cases of this sort, not only that he who has the first estate of inheritance should be before the Court, but that the intermediate remainder-men for life should be parties. (*e*) The same rule will, as we have seen before, apply, where the intermediate estate is contingent or executory, provided the person to take is ascertained; although where the person to take is *not* ascertained, it is sufficient to have before the Court the trustees to support the contingent remainders, and the person in *esse* entitled to the first vested estate of inheritance. (*f*) Executory devises to persons not in being may in [*361] like manner be bound by a decree against *a vested estate of inheritance but a person claiming under limitations by way of executory devise, not subject to any preceding vested estate of inheritance by which it may be defeated, must be a party to a bill affecting his right. (*g*)

If, after a cause has proceeded a certain length, an intermediate remainder-man comes into *esse*, he must be brought before the Court by *supplemental bill*; (*h*) and so, if first tenant in tail, who is made a party to a suit, dies without issue before the termination of the suit, according to the constant practice of the Court the suit is proceeded in against the next tenant in tail, as if he had been originally a party; and this is done by means of a supplemental bill. It seems also clear, that if a tenant in tail is plaintiff in a suit, and dies without issue, the next remainder-man in tail, although he claim by new limitation, and not through the first plaintiff as his issue, is entitled to continue the suit of the former tenant in tail by supplemental bill, and to have the benefit of the evidence and proceedings in the former suit. (*i*)

The rule which requires that all persons who are interested in resisting the plaintiff's demands should be brought before the Court as defendants, in order to give them an opportunity of litigating the claim set up, renders it imperative that wherever more than one person is liable to contribute to the satisfaction of the plaintiff's claim, they should all be made parties to the suit. (*k*) Thus, if there be an agreement in a parish by a vestry order that a sum of 100*l.* per annum should be paid to A. for a lecture in the parish, in a bill for the recovery of it, all the parties to the order must be made defendants, otherwise it cannot be decreed. (*l*) And so, if there be a demand against a partnership firm, all

(*b*) Reynoldson v. Perkins. Amb. 564.
(*c*) *Per* Lord Eldon, in Lloyd v. Johnes, 9 Ves. 64; *vide etiam* Giffard v. Hort, 1 Sch. & Lef. 386.
(*d*) Powell on Mortgage, 1054.
(*e*) *Per* Lord Eldon, in Gower v. Stacpoole, 1 Dow. 18, 32.
(*f*) Lord Cholmondeley v. Lord Clinton, 2 Jac. & W. 7; Hopkins v. Hopkins, 1 Atk. 590.
(*g*) Lord Red. 141.
(*h*) *Per* Lord Eldon, in Lloyd v. Johnes, 9 Ves. 59.
(*i*) Lloyd v. Johnes, 9 Ves. 59. (*k*) Jackson v. Rawlins, 2 Vern. 195.
(*l*) Henchman v. Ayer, 1 Eq. Ca. Ab. 72, Pl. 3; Hardr. 333, S. C.

the persons constituting that firm must be before the Court; and if any of them are dead, the representatives of the deceased partners must be likewise made parties. Thus, where a bill was filed by the captain of a ship against the personal representative of the survivor of two partners, who were joint owners of the ship, *for an account and satisfaction of his demand, it was held that the suit was defective, because the representative of the other partner, who might be interested in the account, was not before the Court, although at law the case would have been different. (m) And it is to be observed that, in that case, the surviving partner had purchased the share of the deceased partner in the ship; but that circumstance was held to make no difference, as the proceeding was not *in rem*. [*362]

Upon the same principle, a bill for payment of money due upon a bond must be against all the obligors; (n) thus, if one sue the executor of an obligor to discover assets, you must make all the obligors parties, that the charge may be equal. (o) In the case of *Madox* v. *Jackson*, (p) where there were three obligors in a bond, and the plaintiff, the obligee, brought only one obligor before the Court, and the representatives of another, but not the third, the bill stating that he was dead, an objection was taken for want of parties, by one of the defendants, who insisted that the representative of the third obligor ought to have been made a party, as it was possible he might have paid off the bond, or at least, if before the Court, might contribute his part towards payment of it; and Lord Hardwicke, although he over-ruled the objection upon the special circumstances of that case, said, "the general rule of the Court, to be sure is, where a debt is joint and several, the plaintiff must bring each of the debtors before the Court, because they are entitled to the assistance of each other, in taking the account. Another reason is, that the debtors are entitled to a contribution where one pays more than his share of the debt; a further reason is, that if there are different funds, as where the debt is a specialty, and he might sue at law either the heir or executor for satisfaction, he must make both parties, as he may come in the last place upon the real assets." It is right to state here, that the rule as stated by Lord Hardwicke in the above case, is at variance with that of Lord King, in *Collins* v. *Griffith*. (q) But the question is put beyond all doubt, not only by the decision of *Lord Hardwicke, in *Madox* v. *Jackson*, above referred to, but by that of Lord Thurlow, in *Angerstein* v. *Clarke*, (r) and of Lord Eldon, in *Cockburn* v. *Thompson*, (s) in which the rule that all the co-obligors must be parties has been distinctly recognized. The same rule has since been followed by Sir J. Leach, in *Bland* v. *Winter*. (t) [*363]

It is however clear, that if a judgment has been had at law against one obligor, you may sue the executor of that one alone to discover assets, &c., because the bond is drowned in the judgment. (u)

It is stated by Lord Hardwicke, in the case of *Madox* v. *Jackson*, above referred to, that the rule that all the obligors in a bond, or their representatives, must be parties to a suit by the obligee, is subject to exceptions. Where the obligor who is sued is the principal, and the other obligors are only sureties, there is no pretence in such a case for the principal in the bond to say, that the creditor ought to bring the surety before the Court, unless he had paid the debt; (x) and the same exception has been recognized by Lord Eldon, in *Cock-*

(m) Pierson v. Robinson, 3 Swan. 139 n.
(n) Anon. Freeman, 127.
(o) Blois v. Blois, 2 Vent. 348.
(p) 3 Atk. 406.
(q) 2 P. Wms. 314.
(r) 2 Dickens, 738; 3 Swans. 147.
(s) 16 Ves. 326.
(t) 1 S. & S. 247.
(u) Blois v. Blois, 2 Vent. 348.
(x) 3 Atk. 406, *vide etiam* Blois v. Blois, *ubi supra*.

burn v. *Thompson.* The exception above noticed will not, however, apply to the case of a person who has executed a conveyance, or created a charge upon his own estate, as a collateral security for another. This appears to have been the result of the determination in *Stokes* v. *Clendon*, (*y*) which was the case of a mortgage by a principal of one estate, and by the surety of another, as a collateral security; and the Master of the Rolls determined, that a bill of foreclosure against the principal could not be sustained, without making the other mortgagor a party, because the other had a right to redeem and be present at the account, to prevent the burthen ultimately falling upon his own estate, or at least falling upon it to a larger amount than the other estate might be deficient to satisfy.

In the preceding case it is to be observed, that the surety had conveyed his own estate by way of security to the mortgagee. Where, however, he merely [*364] enters into a personal *covenant as surety for the principal, but does not convey any estate or interest to the mortgagee, there he will not be considered as a necessary party; and where A. having a general power of appointment over an estate, in the event of his surviving his father, joined with two other persons as his sureties, in a covenant, to pay an annuity to the plaintiff; and also covenanted, that he would create a term in the estate if he survived his father; and upon the death of his father a bill was filed by the plaintiff against A., and other parties interested in the estate, to have the arrears of his annuity raised and paid; it was held upon demurrer, that the sureties were not necessary parties. (*z*)

In a bill by one surety against another, to make him contribute, it was held, that the executor of a third surety who was dead ought to be a party, though he died insolvent. (*a*) In that case the principal had given a counter-bond of indemnity to the plaintiff, who had taken him in execution upon it, and he had been discharged by an Insolvent Act; and though he appears not to have been made a party, yet no objection was taken; (*b*) and it seems that from this circumstance, and also from the case of *Lawson* v. *Wright*, (*c*) that if the principal is clearly insolvent, and can be proved to be so (as by his having taken advantage of an Act for the Relief of Insolvent Debtors,) he need not be a party to the suit. It will, however, be necessary, if the principal be not a party, that the fact of his insolvency should be proved; whereas, if he be a party to the suit, such proof will be unnecessary. In the case above cited from Finch, (*d*) the insolvency of the principal was apparent from the fact of his having taken advantage of the Insolvent Act; but it is presumed that the insolvency of the co-surety was not so capable of proof, and that it was upon that ground held necessary to have his personal representative before the Court, in order to take an account of his estate. Where the fact of the insolvency of one of the sureties was clear, and admitted by the answers, Lord Hardwicke held, that there was no necessity [*365] to bring his *representatives before the Court. (*e*) It seems, however, that the plaintiff has his election, whether he will bring the insolvent co-obligor or his representative before the Court or not.

And where a bill was filed by an obligee against the principal obligor in a joint and separate bond, and the representative of another obligor, who was a surety, and it was stated in the bill that the principal obligor was insolvent, Sir John Leach held, that the plaintiff had a right, notwithstanding such statement, to make the principal obligor a party, and refused him his costs. (*f*)

(*y*) Cited 2 Bro. C. C. 275 *notis*, Edit. Belt.
(*z*) Newton v. Earl of Egmont, 4 Sim. 574.
(*a*) Hole v. Harrison, Finch. 15.
(*b*) Ibid.
(*c*) 1 Cox, 276.
(*d*) Hole v. Harrison.
(*e*) Madox v. Jackson, *ubi supra*.
(*f*) Haywood v. Ovey, Mad. & Geld. 112.

hough it is generally necessary where there is a joint demand against sev-
ersons, to have all those persons before the Court, yet where there are
al persons who are each liable to account for his own receipts, a bill may
ed against one or more of them for an account of their own receipts and
ents, without bringing the others parties to the suit. Thus, where a resi-
y legatee brought his bill against one of two executors, without his co-ex-
or, who was abroad, to have an account of his own receipts and payments,
Lord Chancellor said, "the cause shall go on, and if upon the account
thing appear difficult, the Court will take care of it; the reason is the same
e as in the case of joint factors, and the issuing out of process in this case is
rely matter of form." (g)

The same rule will, it appears, be adopted, where there are joint factors,
d one of them is out of the jurisdiction. And in the case of *Lady Selyard*
. *The Executors of Harris*, (h) above referred to, where it did not appear
at the parties were out of the jurisdiction, the Court permitted the represen-
ives of one of several trustees, who were dead, to be sued for an account of
he receipts and disbursements of his testator, who alone managed the trust,
without bringing the representatives of the other trustees before the Court. But
where a bill is against trustees guilty of a breach of trust, the
*representatives of those trustees who are guilty of the same breach [*366]
of trust, must be parties. (i)

Where the parties liable to the demand have been very numerous, the Court
have, in like manner, permitted a bill to be filed against a few of them, to
compel the payment of their aliquot shares, without bringing the others before
it. Thus, where fifty persons join together to form a bank, and to procure an
Act of Parliament to establish and settle it, and were at equal charges, and
about two hundred and fifty subscribed to raise a fund, but the speculation
turned out unfavourable, whereby a loss of about 6,000*l.* was sustained by the
first proprietors, who thereupon exhibited their bill against sixteen of the two
hundred and fifty subscribers, to compel them to bear their proportion of the
loss; it was moved that the bill should abate for want of parties, but over-ruled,
for the plaintiffs only prayed that the defendants might bear their proportion of
the loss, which would appear before the Master as well as if all the two hun-
dred and fifty subscribers were there, and so it could be no prejudice to those
defendants. (k)

And it seems that even though the demand be against several persons jointly,
the Court will entertain a suit against some of them for the whole, where the
others are abroad, or have stood out the process. Thus, where a bill was filed
for the recovery of a joint debt against one of two partners, the other being out
of the kingdom, and the question before the Court was, whether the defendant
should pay the whole or only a moiety of the debt, Lord Hardwicke was of
opinion that he ought to pay the whole. (l)

The rule that all the co-obligors are to be before the Court, is a rule of con-
venience, to prevent further suits for a contribution, and not a rule of necessity,
and therefore may be dispensed with, especially where the parties are many,
and the delays may be multiplied and continued: therefore, where there were
a great number of obligors, and many of them were dead, and some leaving
assets and others leaving none, the Court proceeded to a decree, though all of

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(g) Cowslad v. Cely, Prec. in Ch. 83: 1 Eq. Ca. Ab. 73, Pl. 18; 2 Eq. Ca. Ab. 165, Pl. 3, S. C.
(h) P. 339.
(i) MSS. *Ante*, p. 340.
(k) Anon. 2 Eq. Ca. Ab. 166, Pl. 27.
(l) Darwent v. Walton, 2 Atk. 510.

[*367] them *were not before it. (m) And so in the case of the joint-stock bank above noticed, the presence of all the subscribers to the undertaking was dispensed with. (n)

The general rule requiring the presence of all parties interested in resisting the demand, has also been dispensed with in a variety of cases where the parties were numerous, and the ends of justice could be sufficiently answered by a sufficient number being before the Court to represent the rights of all. Thus, where A. agreed with B. and C. to pave the streets of a parish, and B. and C. on behalf of themselves and the rest of the parish, agreed to pay A., and the agreement was lodged in the hands of B., it was held that A. should have his remedy against B. and C., and that they must resort to the rest of the parish. (o) And so in *Cullen* v. *The Duke of Queensberry*, where a bill was filled by a tradesman against the committee of a voluntary society, called "The Ladies' Club," for money expended and work done under a contract entered into by the defendant, on behalf of themselves and the other subscribers, and it was objected that all the members who had subscribed should be parties, the objection was over-ruled, and a decree made for the plaintiff. (p)

The same rule was acted upon by Sir Thomas Plumer, M. R., in a bill for the specific performance of an agreement for a lease, against the treasurer and directors of a joint-stock company established by Act of Parliament, who had purchased the fee of the premises from the party who had entered into the agreement, although the rest of the proprietors, whose concurrence in the conveyance would be necessary, were not before the Court. (q) In his judgment on that occasion, the Master of the Rolls, with his usual industry, took a review of all the authorities upon the subject, and the result of his opinion was, that although the bill required an act to be done by parties who were absent, yet, as they were so numerous that they could not be brought before the Court, he [*368] would go as far as he could to bind their right, and made a decree declaring *the plaintiffs entitled to a specific performance, and restraining the treasurer of the company from bringing any action to disturb the plaintiffs in their possession. (r)

From the case of *Horsley* v. *Bell*, (s) cited in the above case of the Ladies' Club, it appears that in cases of this description the acting members of the committee are all liable, though some of them may not have been present at all the meetings which have taken place respecting the contract. In that case the defendants, amongst a great number of other persons, were appointed commissioners under a Navigation Act, and the bill was filed by a person employed to perform certain works in furtherance of the objects of the Act. The defendants were all the acting commissioners, and the plaintiff had been employed on their behalf, and it appeared that the orders had been given at different meetings by such of the defendants as were present at these meetings; but none of the defendants were present at all the meetings, or joined in all the orders, but every one of them were present at some of the meetings, and joined in making some of the orders; and one of the questions in the cause was, whether all the acting commissioners were liable on account of all the orders, or only as to those which they had respectively signed. Upon this point the Court consist-

(m) Lady Cranbourne v. Crispe, Finch, 105; 1 Eq. Ca. Ab. 70.
(n) 2 Eq. Ca. Ab. 166, Pl. 7.
(o) Meriel v. Wymondsold, Hard. 205.
(p) Cullen v. Duke of Queensberry, 1 Bro. C. C. 101; 1 Bro. P. C. 396, S. C. on appeal.
(q) Meux v. Maltby, 2 Swans. 277.
(r) 2 Swans. 286; and *vide* ibid. 287, and the cases there cited.
(s) *Vide* Ambler, 770, and 1 Bro. C. C. 101 n., where the case is more fully reported.

ing of the Lord Chancellor, assisted by two of the Judges, was of opinion that all the acting commissioners were liable *in toto*. It was *ratihabitio et omnis ratihabitio retrahitur et mandato sive licentiæ æquiparatur*. Every one who comes in afterwards approves the former acts; and if any one of the commissioners who had acted before, disapproved the subsequent acts, he might have gone to a future meeting and protested against them.

In a late case of *Attorney General* v. *Brown*, (*t*) which was an information against commissioners under an Act of Parliament, Lord Eldon decided that the information might be sustained against the acting commissioners only (they being 48 only out of 100 appointed by the Act) in respect of their past acts, and that for the purpose of prospective regulation, other *commis- [*369] sioners might be made parties, as they qualified and assumed the functions under the provisions of the Act.

In the preceding cases the decision was made upon the ground that if the plaintiff succeeded in his demands against the individuals sued, they would not be injured, as they had a remedy over against the others for a contribution, which, under their own regulations, they might enforce, although the enforcement of it, on the part of the plaintiffs against so numerous a body, would be nearly impossible. There are, however, other cases in which suits are permitted to proceed against a few, of many individuals of a certain class, without bringing the rest before the Court, although their interests may in some degree be affected by the decision, as in the case of bills of peace brought to establish a general legal right against a great many distinct individuals: Thus, for instance, a bill may be brought by a person having a right at law to demand service from the individuals of a large district to his mill, for the purpose of establishing that right. Properly speaking, all the inhabitants of the district ought to be parties to such a suit; but where the district is large and the inhabitants many, this would be impracticable, and the Court therefore allows the bill to be filed against a small number, for the purpose of establishing the right, and where the right has once been established against those by a decree of the Court, the plaintiff may have the same remedy against any others who may afterwards resist his claim, by merely filing a bill against them stating the former proceedings, and praying the same relief against the defendants in the second suit, as he was declared entitled to against the defendants in the first. (*u*) Upon this principle, the Corporation of London has been allowed to exhibit a bill for the purpose of establishing their right to a duty, and to bring only a few persons before the Court, who dealt in those things on which the duty was claimed. (*x*) And so bills are frequently entertained by lords of manors against some of the tenants, on a question of common affecting them all; and a parson may maintain a bill for tithes against a few of the occupiers within the parish, although they set up a modus to which the whole are jointly *liable. (*z*) [*370] The principle upon which the Courts have acted in these cases, has been very clearly laid down by Lord Eldon in *Adair* v. *The New River Company*. (*a*)

In that case a bill was filed by a person entitled, under the Crown, to a rent reserved out of a moiety of the profits of the New River Company, to which moiety the Crown was entitled under the original charter of that company, but had subsequently granted it to Sir John Myddleton, the original projector, reserving the rent in question. By a variety of *mesne* assignments, the King's moiety of the profits had become vested in a great number of persons, amount-

(*t*) 1 Swan. 265. (*u*) 11 Ves. 429.
(*x*) City of London v. Perkins, 4 Bro. P. C. 158.
(*z*) Hardcastle v. Smithson, 3 Atk. 246. (*a*) 11 Ves. 429.

ing to 100, and the bill was filed against the company and eight of those persons for an account, and it charged that there was not any tangible or corporeal property upon which the plaintiff could distrain, and that the parties were so numerous, and thus liable to so many fluctuations, that it was impossible, if the plaintiff could discover them, to bring them all before the Court, and that these impediments were not occasioned by the plaintiff or those under whom he claimed, but by the defendants, &c. To this bill an objection was taken for want of parties, because all the persons interested in the King's share were not before the Court; but Lord Eldon said that there was no doubt that it is generally the rule that wherever a rent-charge is granted, all persons who have to litigate any title with regard to that rent-charge or with each other, as being liable to pay the whole or to contribute amongst themselves, must be brought before the Court; (*b*) but that it was a very different consideration whether it was possible to hold that the rule should be applied to an extent destroying the very purpose for which it was established, viz: that it should prevail where it is actually impracticable to bring all the parties, or where it is attended with inconvenience almost amounting to that, as well as where it can be brought without inconvenience. It must depend upon the circumstances of each case. His Lordship said that there were authorities to show that where it is impracticable the rule shall not be pressed; and in such a case as the one before him, [*371] the King's share being split into such a number *that it is impracticable to go on with a record attempting to bring all parties having interest in the subject to be charged, he should hesitate to determine, that a person having a demand upon the whole or every part of the moiety, does not enough if he brings all whom he can bring.

His Lordship then goes on to say, "there is one class of cases very important upon this subject; viz: where a person having at law a general right to demand service from the individuals of a large district to his mill for instance, may sue thus in equity: his demand is upon every individual not to grind corn for their own subsistence except at his mill; to bring actions against any individual for subtracting that service is regarded as perfectly impracticable, therefore, a bill is filed to establish that right, and it is not necessary to bring all the individuals. Why? Not that it is inexpedient, but that it is impracticable to bring them all. The Court, therefore, has required so many that it can be justly said they will fairly and honestly try the legal right between themselves, all other persons interested, and the plaintiff; and when the legal right is so established at law, the remedy in equity is very simple: merely a bill stating that the right has been established in such a proceeding, and upon that ground a Court of Equity will give the plaintiff relief against the defendants in the second suit only represented by those in the first, I feel a strong inclination that a decree of the same nature may be made in this case." (*c*) In the above case of *Adair* v. *The New River Company*, Lord Eldon laid it down as a rule, that wherever a rent-charge is granted, all persons whose estates are liable must be brought before the Court. This rule, however, is liable to an exception in the case of charities, which are considered entitled to greater indulgence in matters of pleading and practice than ordinary parties. (*d*) Thus, in *Attorney General* v. *Shelley*, (*e*) it was held, that in the case of a charity it is not necessary that all the *terre-tenants* should be brought before *the Court, [*372] because every part of the land was liable, and the charity ought

(*b*) *Vide* 1 Eq. Ca. Ab. 72.
(*c*) *Vide acc.* Biscoe v. The Undertakers of the Land Bank, cited in Cuthbert v. Westwood, Vin. Ab. tit. Party, B. 255, Pl. 58.
(*d*) Attorney General v. Jackson, 11 Ves. 367.
(*e*) 1 Salk. 163.

not to be put to this difficulty. The same exception to the general rule was admitted in the case of *Attorney General* v. *Wyburgh*. (g) In that case a man had charged all his lands in Chigwell and in Enfield with 20*l.* per annum for the poor of Enfield, and an information being brought to make divers lands in Enfield liable to the charity, leaving out the Chigwell lands, it was objected that the Chigwell lands ought to contribute, and the owners thereof be made parties; but the Lord Chancellor (Macclesfield) said, that the objection was in the nature of a plea in abatement, and that unless it had been insisted upon in the answer, and the particular owners shown, he would put the owners of the Enfield lands to take the labouring oar on themselves, and find out the Chigwell lands. It does not appear, however, from these cases, that under similar circumstances the Court will at once make a decree, charging those tenants who are before the Court, and leave them to a new suit with the other *terre-tenants* if they can find them out; but the result is merely this, viz: that if there is before the Court a party who in respect of the land possessed by him is liable to a rent, charged upon that together with other lands, the Court will not stop the proceedings for want of parties, but will go on in the first place to determine whether the defendant is liable, and will then direct inquiries whether any and what other lands are chargeable with them, reserving the consideration of what shall be done with respect to any other lands that may appear to be chargeable. (h)

It is to be observed, that the rule laid down by Lord Eldon, in *Adair* v. *The New River Company*, applies only to cases where there is one general right in all the parties concerned; that is, where the character of all the parties, so far as the right is concerned, is homogenous, as is the case in suits to establish a modus, or a right of suit to a mill; and that notwithstanding the inconvenience arising from numerous parties, there are some cases in which they cannot be dispensed with, as in the *case of a bill filed to have the benefit of a charge on an estate, in which case all persons must be made parties who claim an interest in such estate. Thus, where estates had been conveyed to trustees, in trust for such creditors of the grantor, as should execute the conveyance, and one incumbrancer, some of whose incumbrances were prior and some subsequent to the trust-deed, filed a bill praying that his rights and interests under his securities might be established, and the priorities of himself and the other incumbrancers declared; and alleging that the deed was executed by thirty creditors of the grantor, and amongst others by two individuals who were named as defendants, and charging that such creditors were too numerous to be all made parties to the suit, and that he was ignorant of the priorities and interests of such parties and of their residences, and whether they were living or dead, save as to the two who were named; a plea by some of the defendants, setting out the names and residences of the persons who had executed the deed, and alleging that they were living and necessary parties to the suit, was allowed. (i) [*373]

With reference to this decision it may be observed, that it is the general and almost universal practice of the Court, in suits for establishing charges upon estates, to make all persons entitled to incumbrances subsequent to the plaintiff's charge, parties to the suit. Thus, in the case of a bill to foreclose a mortgage, all persons, who have incumbrances upon the estate which are posterior in point of time to the plaintiff's mortgage, must be made defendants; for although, if there are many incumbrancers, some of whom are not made parties to a bill of foreclosure, the plaintiff may, notwithstanding, foreclose such of the defend-

(g) 1 P. Wms. 599.
(h) Attorney General v. Jackson, 11 Ves. 365.
(i) Newton v. Earl Egmont, 5 Sim. 130.

ants as he has brought before the Court: (*k*) yet such decree will not bind the other incumbrancers who are not parties, even though the mortgagee at the time of foreclosure had no notice of the existence of such incumbrancers. (*l*) This [*374] rule may at first appear to be *inconsistent with the usual principles of a Court of Equity, but the justice of it is very clearly shown in the report of the Lord Keeper's (Finch) judgment in *Sherman* v. *Cox*. (*m*) His Lordship says, "Although there be a great mischief on one hand that a mortgagee, after a decree against the mortgagor to foreclose him of his equity of redemption, shall never know when to be at rest, for if there be any other incumbrances, he is still liable to an account, yet the inconvenience is far greater on the other side; for if a mortgagee that is a stranger to this decree should be concluded, he would be absolutely without remedy, and lose his whole money, when, perhaps, a decree may be huddled up purposely to cheat him, and in the mean time (he being paid his interest) may be lulled asleep and think nothing of it; whereas, on the other hand, there is no prejudice but being liable to the trouble of an account, and if so be that were stated *bona fide* between the mortgagor and mortgagee in the suit wherein the decree was obtained, that shall be no more ravelled into, but for so long shall stand untouched." (*n*)

Upon the same ground it was that Lord Alvanley, in the *Bishop of Winchester* v. *Beavor*, (*o*) ordered a bill of foreclosure to stand over for the purpose of making a judgment-creditor a party. From the marginal note to that case, a doubt appears to arise as to whether the Master of the Rolls intended to adopt the general rule, that all incumbrancers must be parties to a bill of foreclosure; but the decision rests upon the rule of practice, which has been stated, and it cannot after that decision be doubted that all incumbrancers whose liens appear upon the answer, must be made parties, and if that answer be a sufficient one and true, it must, according to the practice in drawing bills stated in the note [*375] below, *appear upon the answer who such incumbrancers are. At all events it is evident, from the cases of *Lomax* v. *Hide*, *Godfrey* v. *Chadwell*, *Morrett* v. *Westerne*, above referred to, (*p*) that if a mortgagee wishes to obtain an undisputed right to an estate by foreclosure, he must make all incumbrancers upon the estate, of whose liens he has notice, (whether appearing upon the answer or not,) parties to his suit.

The rule which requires all incumbrancers upon the equity of redemption to be brought before the Court in cases of foreclosure, extends to cases in which the subject of the litigation has been sold, or charged subsequently to the date of the plaintiff's claim, whether such sale or charge has been by legal instrument, or only by agreement, or whether it extends to the whole or only partial interests. Thus, where a bill was filed by a lessee to compel a landlord to give his licence to the assignment of a lease to a purchaser, on the ground that he had by certain acts waived the right to withhold it, which had been reserved to him by the original lease, the purchaser was held to be a necessary party. (*q*)

(*k*) Draper v. Lord Clarendon, 2 Vern, 518.

(*l*) Lomax v. Hide, 2 Vern. 185; Godfrey v. Chadwell, ib. 601; 1 Eq. Ca. Ab. 318, Pl. 7; S. C.; Morret v. Westerne, 2 Vern, 663; 1 Eq. Ca. Ab. 164, Pl. 7, S. C.

(*m*) 2 Freem. 14.

(*n*) What is here said by the Lord Chancellor on the subject of the account, as well as the case of Needler v. Deeble, 1 Cha. Ca. 299, appears to be at variance with the decision in Morret v. Westerne, *supra*. It seems to be in consequence of the rule above laid down, that the practice prevails of introducing an interrogatory into a bill of foreclosure, inquiring whether there are any and what incumbrances affecting the estate besides that of the plaintiff, in order that, if the answer states any, the owners of such incumbrances be made parties.

(*o*) 3 Ves. 313. (*p*) *Ante*, p. 373.

(*q*) Maule v. Duke of Beaufort, 1 Russ, 349.

And so if a man contracts with another for the purchase of an estate, and afterwards, before conveyance, enters into a covenant with a third person that the vendor shall convey the estate to such third person, the vendor, if he have notice of the subsequent contract, cannot with safety convey the estate to the vendee without the concurrence of the third person, who in that case will be a necessary party to a bill by the purchaser against the vendor for a specific performance; but if A. contracts with B. to convey to him an estate, and B. enters into a sub-contract with C., that he, B., will convey to him the same estate, then if B. files a bill against A., C. will not be a necessary party, because A. is in that case in no manner affected by the sub-contract, which his conveyance to B. would rather protect than injure. (r) And where a bill was filed by creditors to set aside a purchase on the ground of fraud, and it appeared that the purchaser had, since his purchase, *executed a mortgage of the estate, the mortgagee was considered a necessary party. (s) [*376]

The rule which requires all subsequent incumbrancers to be parties, extends only to cases in which the subsequent charges or incumbrances are specific, and we have before seen, that in most cases where estates have been conveyed to trustees to pay debts or legacies, the trustees may sustain suits respecting the trust property, without those claiming under the trust being parties to it, although in a bill to foreclose them the *cestui que trusts* must all be before the Court. (t) It is also unnecessary that persons having prior mortgages or incumbrances should be parties, because they will have the same lien upon the estate after a decree as they had before; (u) for this reason it has been held, that in a bill for a partition, a mortgagee upon the whole estate is not a necessary party, though a mortgagee of one of the undivided portions would be. (x) And so where a bill was brought by a mortgagor against a mortgagee, praying a sale of the mortgaged estate, persons who had annuities prior to the mortgage were held unnecessary parties, and notwithstanding they appeared at the hearing and consented to a sale, the Master of the Rolls, Lord Kenyon, dismissed the bill as to them with costs, and said that the estate must be sold subject to their annuities. (y) It must have been upon the same principle, that the case of *Lord Hollis*, cited in 3 Cha. Rep. 86, wherein it was held that a third mortgagee buying in the first, need not make a second mortgagee a party, was decided, otherwise, it is not easy to reconcile that case with the other principles which have been laid down. It cannot be supposed that it was meant to be decided that a third mortgagee buying in the first mortgage, could by that process acquire the right to foreclose the second, without bringing him before the Court, and giving him an opportunity to redeem.

It is right to remark here, that in all cases where a mortgagee is made a party to a suit by the mortgagor or those claiming under him, he is entitled to be redeemed; (z) and that therefore, *unless a second mortgagee or other incumbrancer is prepared to redeem him, he will be an improper party to a suit by such mortgagee or incumbrancer, where the object is merely to foreclose the equity of redemption. [*377]

It is also to be observed, that a second incumbrancer may file a bill to redeem the first, without making a subsequent incumbrancer a party; and that if he brings him before the Court for the mere purpose of having his incumbrance postponed, and not to foreclose him, the bill will be dismissed against him with costs. (a)

(r) —— v. Walford, 4 Russ, 372.
(s) Copis v. Middleton, 2 Mad. 410.
(t) Lord Red. 142, *ante*.
(u) Rose v. Page, 2 Sim. 471.
(x) Swan v Swan, 8 Pri. 518.
(y) Delabere v. Norwood, 3 Swan. 144, n.
(z) Drew v. O'Hara, 2 Ball. & Beat. 562, n.; Cholmley v. Countess of Oxford, 2 Atk. 267.
(a) Shepherd v. Gwinnet, 3 Swan. 157, n.

In a recent case, where a female defendant had married during the progress of a cause, upon which occasion her interest in the subject matter had become the subject of a settlement, upon an objection being, on that ground, made to the cause being heard till the husband and parties interested under the settlement were before the Court, the Vice Chancellor said, that as the settlement had been made *pendente lite*, the plaintiffs might, if they pleased, have the cause heard and take a decree, and then, if necessary, file a supplemental bill to bring the husband and other parties before the Court. (*b*)

With respect to incumbrancers or purchasers becoming such *after* a bill has been filed, they will be bound by the decree, and need not be made parties to the suit, whether the plaintiff have notice of them or not, for an alienation pending a suit is void, or rather voidable. (*c*) If, therefore, after a bill filed by the first mortgagee to foreclose, the mortgagor confesses a judgment, executes a second mortgage, or assigns the equity of redemption, the plaintiff need not make the incumbrancer, mortgagee or assignee parties, for they will be bound by the suit; and where a purchaser took an exception to a title, because two mortgagees, who became such after the bill was filed, were no parties to the foreclosure, the exception was over-ruled with costs. (*d*)

[*378] In these cases it is to be observed, that the legal estate was in the plaintiff, and remained so during the proceedings. But *in cases where a change in the ownership of the legal estate takes place pending the suit, by alienation or otherwise, the new owner must be brought before the Court in some shape or other, in order that he may execute a conveyance of the legal estate. (*e*)

If a person, *pendente lite*, takes an assignment of the interest of one of the parties to the suit, he may if he pleases make himself a party to the suit by supplemental bill, but he cannot by petition pray to be admitted to take a part as a party defendant; all that the Court will do is to make an order that the assignor shall not take the property out of Court without notice. (*f*)

We come now to the consideration of those cases in which it is necessary to make persons defendants to a suit, not because their rights may be directly affected by the decree, if obtained, but because, in the event of the plaintiff succeeding in his object against the principal defendant, that defendant will thereby acquire a right to call upon him either to reimburse him the whole or part of his demand, or to do some act towards reinstating him in the situation he would have been in but for the success of the plaintiff's claim. In such cases the Court, in order to avoid a multiplicity of suits, requires that the parties so consequentially liable to be affected by the decree, shall be before the Court in the first instance, in order that their liabilities may be adjudicated upon and settled by one proceeding. Thus, where a defendant in his answer insisted that he was entitled to be reimbursed by A. what he might be decreed to pay to the plaintiff, and therefore that A. was a necessary party, the Court, at the hearing, directed the cause to stand over, with liberty to the plaintiff to amend by making A. a defendant. (*g*) And so where an heir-at-law brought a bill against

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(*b*) Oldaker v. Lavender, 6 Sim. 239–244.

(*c*) Walker v. Smallwood, Amb. 676; Gaskill v. Durdin, 2 Be. & Be. 167; Moore v. M'Namara, 1 Be. & Be. 309; Gentle v. Ward, 2 Atk. 175; Metcalfe v. Pulverteft, 2 V. & B. 207.

(*d*) Bishop Winchester v. Paine, 11 Ves. 199.

(*e*) Daly v. Kelly, 4 Dow. 435; Bishop of Winchester v. Paine, *supra*.

(*f*) Foster v. Deacon, Mad. & Geld, 59. (*g*) Greenwood v. Atkinson, 5 Sim. 419.

a widow to compel her to abide by her election, and to take a legacy in lieu of dower, it was held that the personal representative was a necessary party, because in the event of the plaintiff's succeeding she was entitled *to satisfaction for her legacy out of the personal estate; and the plaintiff had leave to amend, by making the executor a party. (h) [*379]

Upon this principle it is that the Courts proceed in the case of sureties and of joint obligors in a bond, (before referred to) in requiring all those who are bound, or their representatives, to be before the Court, in order to avoid the multiplicity of suits which would be occasioned if one or more were to be sued without the others, and left to seek contribution from their co-sureties or co-obligors in other proceedings. (i) And upon the same ground, where a bill had been filed by bail against the creditor for an account of dealings between him and the principal debtor, upon which bill the bail had obtained an injunction to restrain the creditor from proceeding in his action at law against them upon the bail bond, Lord Chief Baron Eyre dissolved the injunction, because the principal, although named as a defendant, was alleged to be out of the jurisdiction of the Court. (j)

Upon the same principle it is, that in suits by specialty creditors, for satisfaction of their demands out of the real estate of a person deceased, it is required that the personal as well as the real representatives should be brought before the Court, (k) because the personal estate, being the primary fund for payment of debts, ought to go in ease of the land, (l) and the heir has a right to insist that it shall be exhausted for that purpose before the realty is charged; so that if a decree were to be made in the first instance against the heir, he would be entitled to file a bill against the personal representative to reimburse himself. The Court, therefore, in order to avoid a multiplicity of suits, requires both the executor and heir to be before them, in order that it may, in the first instance, do complete justice, by decreeing the executor to pay the debt, as far as the personal assets will extend, the rest to be made good by the heir out of the real assets. (m) Upon this principle it was, that where a man covenanted for *himself and his heirs that a jointure house should remain to the uses in a settlement, and the jointress brought a bill against the heir to compel him to rebuild and finish the jointure house, and to make satisfaction for the damage which she had sustained for want of the use thereof, Lord Talbot allowed a demurrer, on the ground that the executor ought to be a party, because the Court would not in the first instance decree against the heir to perform his covenant, and then put the heir upon another bill against the personal representative to reimburse himself out of the personal assets. (n) [*380]

Upon the like ground, where L. O., being indebted by judgment, and seized of lands, died intestate, leaving an infant heir, whereupon the wife took administration, and possessed herself of the personal estate, and also entered into the lands as guardian to the heir, and after receiving the rents for two years, died, having made a will, and appointed the defendant her executrix, who proved the will, and entered upon the land as guardian; the heir died, and his heir was obliged to pay off the judgment, whereupon he filed a bill against the defendant to be reimbursed, to which a demurrer was put in, because no administrator *de bonis non* of L. O. was party; and the Lord Keeper's opinion was, that the profits taken by the guardian would be liable to make satisfaction to the plaintiff, but that the personal estate of L. O. was in the first place liable in

(h) Lesquire v. Lesquire, Rep. t. Finch, 134.
(i) *Ante*, p. 362.
(k) 3 Atk. 406.
(m) Knight v. Knight, 3 P. Wms. 333.
(j) Roveray v. Grayson, 3 Swan. 145 n.
(l) Galton v. Hancock, 2 Atk. 434.
(n) Knight v. Knight, 3 P. Wms. 333.

ease of the heir, and in that respect held the bill ill, and gave the plaintiff leave to amend. (o)

A bill of discovery of real assets may, however, be brought against the heir, in order to preserve a debt, without making the administrator a party, where it is suggested that the representation is contested in the Ecclesiastical Court; (p) and where the heir of an obligor would not administer himself, and had opposed the plaintiff, who was a principal creditor, in taking out administration, a demurrer by him, because the administrator was not a party, was over-ruled. (q)

[*381] Where the nature of the relief prayed is such that the heir-at-law has no remedy over against the personal estate, *the personal representative is an unnecessary party; thus in the case of a bill filed by a mortgagee against the heir of a mortgagor to foreclose, the executor of the mortgagor is an unnecessary party, because in such a case the mortgagee has a right to the land pledged, and is not in anyways bound to intermeddle with the personal estate, or to run into an account thereof; and if the heir would have the benefit of any payment made by the mortgagor or his executor, he must prove it. (r) And it makes no difference if the mortgage be by demise for a term of years, provided the mortgagor was seized in fee; in such case the executor is an unnecessary party, and if made one, the bill against him will be dismissed with costs. (s) And where a term of 1,000 years had been granted, but conditioned to sink and be extinguished upon payment of an annuity for forty-two years, and at the expiration of the time a bill was brought by the heir of the grantor for a surrender of the residue of the term, it was held that the personal representative of the grantor need not be a party. (t)

Where however a bill is filed to redeem a mortgage against the heir of a mortgagee, the personal representative must also, as the party entitled to the money, be made a party to the suit, because, although the mortgagee upon paying the principal money and interest has a right to a reconveyance from the heir, yet the heir is not entitled to receive the money; and, if it were paid to him, the personal representative would have a right to sue him for it. And so to a bill which prays a sale instead of a foreclosure, (u) the personal as well as the real representative must be a party, because it is requisite to show that the

[*382] personal estate *has been exhausted before the real estate can be sold, the personal estate being in such case the primary fund. (x) And where a mortgagee having a power of sale, without the concurrence of the mortgagor, resorted to the Court of Chancery to compel a sale against the heir, Sir William Grant held, that the executor was also a necessary party, because if a person having the legal title and being competent to sell, will have the assistance of the Court, all who are interested in the result of the sale must be parties, that the whole of their claims may be arranged by the decree. (y)

(o) Bressenden v. Decreets, 2 Ch. Ca. 197. (p) Plunket v. Penson, 2 Atk. 51.

(q) D'Aranda v. Whittingham, Mos. 84.

(r) Duncombe v. Hansley, 3 P. Wms. 333, *notis;* Fell v. Brown, 2 Bro. C. C. 279.

(s) Bradshaw v. Outram, 13 Ves. 234. If the mortgage was of a chattel interest, of course the executor, and not the heir, would be the proper party; and if freehold and leasehold estates are both comprised in the same mortgage, both the heir and executor will be necessary parties to a bill of foreclosure. Robins v. Hodgson, Rolls, 15 Feb. 1794.

(t) Bampfield v. Vaughan, Rep. t. Finch, 104.

(u) The cases in which a mortgagee may have a sale instead of a foreclosure, are—1, where the estate is deficient to pay the incumbrance; 2, where the mortgage is of a dry reversion; 3, where the mortgagee dies and the equity of redemption descends upon an infant; 4, where the mortgage is of an advowson; 5, where the mortgagor becomes a bankrupt; and 6, where a mortgage is of an estate in Ireland. *Vide* 2 Powell on Mortgages, by Coventry, 1016, n. T.

(x) Daniel v. Skipwith, 3 Bro. C. C. 155; Hodgson v. Parker, ibid, Belt's Edit. note.

(y) Christopher v. Sparke, 2 J. & W. 229.

Where a man contracts for the purchase of an estate, and dies intestate as to the estate contracted for before the completion of the contract, the vendor has a right to file a bill against his personal representative for payment of the purchase-money, but if he does, he must make the heir-at-law a party, because the heir is the person entitled to the estate. And for the same reason where the vendee, after the cause was at issue, died, having devised the estate which was the subject of the suit to infant children, and the plaintiff revived against the personal representatives only; it was held that the infant devisees were necessary parties, and the suit was ordered to stand over, in order that they might be brought before the Court. (z)

Upon the same principle, if a vendor were to file a bill against the heir, the heir would have a right to insist upon the personal representative being brought before the Court, because the purchase-money is in the first instance payable out of the personal estate. But where a bill stated that an estate, purchased in the defendant's name, was so purchased in trust for the plaintiff's ancestor who paid the purchase-money, and prayed a re-conveyance, a demurrer on the ground that the executor of the ancestor was not a party, was over-ruled; because the purchase-money having been paid, it was quite clear that no decree could have been made against the personal representative. (a)

*The rule, which requires the presence of all persons who may be eventually interested in the decision has been further exemplified [*383] in the case of *Green* v. *Poole*. (b) In that case a lease had been granted to the plaintiffs of certain tenements, excepting thereout all mines, minerals, &c., with liberty for the lessor, his heirs, lessees or assigns, to dig and work the mines, &c., on paying such reasonable satisfaction for such damages and spoil of ground as were mentioned in a certain lease, by which the mines and minerals were granted to a person of the name of Ord, and in which lease Ord covenanted to pay to Henry Green, the plaintiff's father, who then occupied the lands as tenant from year to year, and to other tenants and farmers within the manor, such satisfaction for damages and spoil of ground as might be awarded by two indifferent persons, to be appointed as therein mentioned. Under this covenant, the plaintiff applied to the lessee of the minerals for satisfaction for the spoil and damage, and arbitrators were appointed, who fixed the amount to be paid by the lessee, which he was willing to pay, but the plaintiff not being satisfied with the award, filed his bill against the representatives of the lessor, who was dead, for satisfaction for the damage. To this bill it was objected at the hearing, that the plaintiff had not made proper parties, and that he ought to have made the persons claiming under Ord's lease of the mines defendants, and the bill was dismissed. The House of Lords, however, reversed the decree, but directed that the appellant should be at liberty to amend his bill by adding proper parties. The precise ground upon which the decision of the House of Lords was founded, does not appear from the report; it is evident, however, that the persons interested in the lease of the mines were considered necessary parties; the reason of which must have been, that if the plaintiff had succeeded in establishing his claim against the estate of the lessor, the representative of the lessor was entitled under the covenant in *Ord's* lease, to proceed to reimburse himself against the persons interested under that lease; and therefore, upon the principle above laid down, the defendant had a right *to insist upon those persons being before the Court in the [*384] first instance, in order that the whole case might be settled at once.

(z) Townsend v. Champernowne, 9 Pri. 130.
(a) Astley v. Fountain, Rep. t. Finch. 4. (b) 5 Bro. P. C. 504.

SECTION III.

Of Objections for want of Parties.

HAVING endeavoured in the preceding sections of this chapter to point out the parties who ought to be brought before the Court by the plaintiff, in order that complete justice may be done in the suit, the next step is to show in what manner an objection, arising from the omission of any of these parties in a bill is to be taken advantage of by the defendant, and how the defect arising from such omission is to be obviated or remedied by the plaintiff.

And here it is necessary to remark, in the first instance, that none are considered as parties to a suit who are not either plaintiffs, or named in the prayer for process; the mere naming a person as a defendant, without praying process against him, not being considered as making him a party. (*a*)

A defect of parties in a suit may be taken advantage of either by demurrer, plea or answer; or if the defect has not been suggested in any of those proceedings, the defendant may still have the benefit of the objection, by statement to the Court at the hearing.

Whenever the deficiency of parties appears on the face of a bill, the want of proper parties is a cause of demurrer. There appears to be some doubt whether a demurrer of this nature can be partial, and whether it must not extend to the whole bill. And in the case of *The East India Company* v. *Coles*, (*b*) Lord Loughborough was inclined to think, that there could not be a partial demurrer for want of parties; but upon Mr. Mitford's (Lord Redesdale) mentioning some cases, (*c*) wherein such partial demurrers had been allowed, the case was ordered to stand over to the next day of demurrers; [*385] *in the mean time, however, the plaintiff's counsel, thinking it better for his client, amended the bill.

It is to be observed, that if a sufficient reason for not bringing a necessary party before the Court is suggested by the bill, as, if a personal representative is required, and the representation is charged to be in litigation in the Ecclesiastical Court, or if the bill seeks a discovery of the persons interested in the matter in question, for the purpose of making them parties, and charges that they are unknown to the plaintiff, a demurrer for want of the necessary parties will not hold. (*d*)

Upon the same principle, where it was stated in a bill that the defendant, who was the next of kin of an intestate, had refused to take out letters of administration, and that the plaintiff had applied to the Prerogative Court for administration, but having been opposed by the defendant, was denied administration, because he could not prove that the intestate had left *bona notabilia;* and that he had afterwards applied to the Consistory Court of Bath and Wells, where he likewise failed, because he could not prove that the intestate had died in the diocese; and that the defendant had refused to discover where the intestate had died; a demurrer for want of proper parties, because the personal representative of the intestate was not before the Court, was over-ruled. (*e*)

It is said that a demurrer for want of parties must show who are the proper parties; not indeed by name, for that might be impossible; (*f*) but in such a manner as to point out to the plaintiff the objection to his bill, so as to enable

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(*a*) Windsor v. Windsor, 2 Dick. 707. (*b*) 3 Swan. 142, n.
(*c*) Astley v. Fountain, Finch, 4; Atwood v. Hawkins, Finch, 113; Bressenden v. Decreets, 2 Ch. Ca. 197.
(*d*) Lord Red. 146. (*e*) D'Aranda v. Whittingham, Mos. 84.
(*f*) Tourton v. Flower, 3 P. Wms. 369.

him to amend by adding the necessary persons. (g) Some doubt has been thrown upon the correctness of this rule, in consequence of an observation by Lord Eldon in *Pyle* v. *Price*. (h) His Lordship is there reported to have said, "that beside the objection which had been mentioned at the bar, to the rule which required the party to be stated, it might appear that the plaintiff knows the party," and then to have observed, "perhaps there is *not a general rule either way." It is submitted, however, that this [*386] observation of Lord Eldon does not at all shake the rule which has been laid down, as to the necessity of pointing out who the necessary party is, but merely refers to the observation made at the bar, that there was no rule requiring a demurrer to state the parties, that is, *by name*, as it might be out of the power of the defendant to do so; and that it does not refer to the necessity of calling the plaintiff's attention to the description or character of the party required, in order to enable him to amend his bill, without putting him to the expense of bringing his demurrer on for argument, which he might otherwise be obliged to do, in order to ascertain who the party required by the defendant is.

Where a demurrer for want of parties is allowed, the cause is not considered so much out of Court but that the plaintiff may afterwards have leave to amend, by bringing the necessary parties before the Court. (i) And where the demurrer has been *ore tenus*, such leave will be granted to him without his paying the costs of the demurrer; though if he seeks, under such circumstances, to amend more extensively, than by merely adding parties, he must pay the defendant the costs of the demurrer. (k)

If the defect of parties is not apparent upon the face of the bill, the proper way of bringing the defect before the Court is by plea, which must aver the matter necessary to show it. (m)

A plea for want of proper parties is a plea in bar, and goes to the whole bill, as well to the discovery as to the relief, where relief is prayed, (n) though the want of parties is no objection to a bill for discovery merely. (o)

Where a sufficient reason to excuse the defect is suggested by the bill, as where a personal representative is a necessary party, and the bill states that the representation is in contest in the Ecclesiastical Court; (p) or where the party is resident out of the jurisdiction of the Court, and the bill charges that *fact; (q) or where the bill seeks a discovery of the [*387] necessary parties, (r) a plea for want of parties will not, any more than a demurrer for the same cause, be allowed, unless the defendant controverts the excuse made by the bill, by pleading matter to show it false. (s) Thus, in the first instance above put, if before the filing of the bill the contest in the Ecclesiastical Court had been determined, and administration granted, and the defendant had shown this by his plea, the objection for want of parties would not in strictness have been good.

Upon arguing a plea of this kind, the Court, instead of allowing it, generally gives the plaintiff leave to amend the bill, upon payment of costs; a liberty which he may also obtain after allowance of the plea, according to the common course of the Court, for the suit is not determined by the allowance of a plea. (t)

(g) Lord Red. 147; Attorney General v. Jackson, 11 Ves. 369.
(h) 6 Ves. 781.
(i) Bressenden v. Decreets, *ubi supra; vide etiam* Lloyd v. Loring, 6 Ves. 773.
(k) Newton v. Lord Egmont, 4 Sim. 585. (m) Lord Red. 226; 1 Vern. 110; 2 Atk. 51.
(n) Plunkett v. Penson, 2 Atk. 51; Hamm v. Stevens, 1 Vern. 110.
(o) Sanguss v. East India Company, 2 Eq. Ca. Ab. 170, Pl. 28.
(p) Plunkett v. Penson, 2 Atk. 51.
(q) Cowslad v. Cely, Prec. Ch. 83; Darwent v. Walton, 2 Atk. 510.
(r) Bowyer v. Covert, 1 Vern. 95. (s) Lord Red. 227.
(t) Ibid.

An objection for want of parties in a bill may also, as has been stated, be noticed by the defendant in his answer, or it may be suggested to the Court at the hearing, without being in any manner noticed in the pleadings, in which case, if the Court thinks the objection well framed, it will order the cause to stand over, and give the plaintiff leave either to amend his bill by adding the proper parties, or to file a supplemental bill for that purpose. If the objection has been stated upon the answer, the order will be made upon the plaintiff paying the defendant the costs of the day; but if it has not been stated upon the answer, the order will be made without payment of the costs of the day. (*u*)

The Court will not at the hearing give leave to the plaintiff to amend by adding parties, if by so doing the nature of the case made by the bill will be changed; and therefore, where a bill was filed for the specific performance of a contract for a lease, in which the contract was alleged to have been entered into for a lease to the plaintiff only, but the defendant by his answer insisted that the contract was for a lease to the plaintiff and A., and at the hearing the plaintiff, after endeavouring unsuccessfully to establish the case as [*388] *made by this bill, applied for leave to amend by making A. a party, Lord Redesdale refused to allow the cause to be adjourned for that purpose, because the addition of the party in such a case would not be like adding a party against whom in a plain case a decree was to be made, but it would be in effect making a new case, founded upon a new agreement, which his Lordship said would be mischievous under such circumstances, because parties who came for the execution of agreements should be compelled to state them as they ought to be stated, and not to set up titles which, when the cause comes to a hearing, they cannot support. (*w*)

In a recent case, before Sir Charles C. Pepys, M. R., an order was made at the hearing that the plaintiffs should be at liberty to amend their bill by adding parties, as they should be advised, or by showing why they are unable to bring the proper parties before the Court. (*x*)

The proper time for taking an objection for want of parties is upon opening the pleadings, and before the merits are discussed; (*y*) but it frequently happens that after a cause has been gone into, and thoroughly heard, the Court has felt itself compelled to let it stand over for the purpose of amendment. (*z*)

The objection for want of parties ought to proceed from a defendant, for it has been decided that the plaintiff bringing his cause to a hearing without proper parties, cannot put it off without the consent of the defendant. (*a*) Cases of exception may occur, where, for instance, the plaintiff was not aware of the existence of persons whose claims could touch the interests of those who were upon the record; but that ought to be clearly established; and the plaintiff ought to apply as soon as he has obtained that knowledge. (*b*)

It appears formerly to have been considered, that where a bill wanted proper parties, it was in the power of the Court either to dismiss it without prejudice to the plaintiff's right to file a new bill, or to give leave to amend; (*c*) [*389] but *it seems that a decree of Sir J. Jekyll's in a cause at the Rolls, to dismiss a bill for the want of parties, was afterwards reversed for that reason, and that a decree of the same nature in the Court of Exchequer was likewise reversed in the House of Lords, and that since that time causes have never been dismissed for want of parties, but are ordered only to stand over on

(*u*) Mitchell v. Bailey, 3 Mad. 63.
(*w*) Deniston v. Little, 2 Sch. & Lef. 11 n.
(*x*) Milligan v. Mitchell, Rolls, July 25, 1835.
(*y*) Jones v. Jones, 3 Atk. 111. (*z*) Ibid.
(*a*) Innis v. Jackson, 16 Ves. 356. (*b*) Ibid.
(*c*) Stafford v. The City of London, 1 P. Wms. 428.

paying the costs of the day, in order that the plaintiff may have the opportunity of making proper parties. (c)

Formerly the costs of the day, as settled by Lord Macclesfield, were, if the cause was heard by the Lord Chancellor, 5*l.*, and if at the Rolls 5*l.* 6*s.* 8*d.*; (d) but now, where a cause being in the paper for hearing is ordered to be adjourned upon payment of the costs of the day, there the party to pay the same, whether before the Lord Chancellor, the Master of the Rolls, or the Vice Chancellor, shall pay the sum of 10*l.*, unless the Court shall make order to the contrary. (e)

A plaintiff may at the hearing obviate an objection for want of a particular party, by waiving the relief he is entitled to against such party; (f) and where the evident consequence of the establishment of the rights asserted by the bill, might be the giving to the plaintiff a claim against other persons who are not parties to the suit, the plaintiff by waiving that claim may avoid the necessity of making those persons parties. (g) This, however, cannot be done to the prejudice of others. (h)

In some cases the defect of parties has been cured at the hearing by the undertaking of the plaintiff to give full effect to the utmost rights which the absent party could have claimed, those rights being such as could not affect the interest of the defendants. Thus, where a bill was filed to set aside a release which had been executed in pursuance of a family arrangement, in consequence of which a sum of stock was invested in the names of trustees for the benefit of the plaintiff's wife and unborn children, which benefit would be lost if the release were set aside, the Master of the Rolls held, that *the trustees of the settlement were necessary parties, in order to assert the right of the children, but upon the plaintiff's counsel undertaking that all the moneys to be recovered by the suit should be settled upon the same trusts for the benefit of the plaintiff's wife and children, his Honor permitted the cause to proceed without the trustees, and ultimately, upon the undertaking of the plaintiff, declared that the plaintiffs were not bound by the release. (i) [*390]

As a decree made in the absence of proper parties may be reversed, and at all events will not bind those who are absent, or those claiming under them, (k) great care should be taken on the part of the plaintiff to have the necessary parties before the Court, and that previously to his bringing the cause on for hearing; (l) because, as we have seen before, he cannot then apply for leave to add parties without the consent of the defendant.

The most usual way of adding parties is by amendment of the original bill, though sometimes it is done by supplemental bill, and the Court will suffer the plaintiff to amend his bill by adding parties at any time before the examination of witnesses has taken place. If there has been no plea or demurrer, such amendment may be made without costs, provided the addition be not so great as to render it necessary for the original defendants to have a new copy of the bill, or to put in a further answer, and provided also the plaintiff undertakes to amend the defendant's office copy according to the addition. (m)

An order to amend by adding parties allows of the introduction of apt words to charge them, and to state the case against them. (o) A plaintiff is not obliged,

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(c) Anon. 2 Atk. 14; Jones v. Jones, 3 Atk. 111; Greene v. Poole, 5 Bro. P. C. 504,
(d) 1 Turner & V. 82. (e) Ord 1828, xxxv; 2 Russ. App. 14.
(f) Pawlet v. the Bishop of Lincoln, 2 Atk. 296.
(g) Lord Red. 146. (h) Ibid.
(i) Harvey v. Cooke, 4 Russ. 35. (k) Prac. Reg. 299.
(l) For cases in which the defect of parties has been remedied by the voluntary appearance at the hearing, *vide ante*, p. 261.
(m) Prac. Reg. 301.
(o) Hand. 77. Palk v. Ld. Clinton, 12 Ves. 48.

in adding parties by amendment, to make them defendants, he may, if he pleases, apply for leave to make them co-plaintiffs, and he has been permitted to do so by special motion after the defendants have answered the original bill. (*p*) It [*391] is to be observed, however, *that after answer the addition of a co-plaintiff is not a matter of course, and that in such case the granting or refusal of an order to amend by adding parties as plaintiffs is discretionary in the Court. Thus, in the case of *The Governors of Luton Free School* v. *Smith*, (*q*) upon an application being made to the Court of Exchequer, that the plaintiffs might be at liberty to amend their bill by the addition of a plaintiff, on payment of 20*s*. costs, &c., the motion not being supported by any affidavit was refused. Upon a similar motion being afterwards made, supported by affidavits, stating the whole facts and proceedings in the cause, and that at the time of the instructions being given to counsel to prepare the original bill, the plaintiff was ignorant of the facts which rendered it necessary to make the party a co-plaintiff, but without stating that the party whose name was proposed to be inserted had given his consent, the motion was ordered to stand over in order that such consent might be given, whereupon an affidavit was afterwards filed, verifying an annexed written consent of the party, and the motion was renewed, but was ultimately refused, upon argument, with costs. (*r*)

From the above case, it is to be collected that where a plaintiff applies after answer for leave to amend his bill by adding a co-plaintiff, he must, in support of his application, show that the person proposed to be added is willing to become a co-plaintiff.

It is to be observed, that a bill of discovery cannot be amended by adding parties as plaintiffs. This was held to be the law of the Court by Lord Eldon in *Lord Cholmondeley* v. *Lord Clinton*, (*s*) where a bill had been filed by *cestui que trusts*, in aid of an ejectment at law, and the defendant pleaded facts to show that the legal estate was in the trustees. The difficulty in the case was, however, got over by the plaintiffs consenting to the allowance of the plea, and moving to amend by inserting a statement to show that the legal estate was in trustees, and that a count had been introduced in the declaration in ejectment on the demise of the trustees.

[*392] In a recent case before Lord Cottenham, L. C., his Lordship *held that an order made at the hearing for leave to amend, by adding parties, did not authorize the introduction of new co-plaintiffs. (*t*)

We have seen, however, before, that where a plaintiff is one of a class who ought to be parties to the suit, but whose number would bring the case within the rule before pointed out, as acted upon where the parties claiming in the same interest as the plaintiff are so many that the introduction of them upon the record would be productive of inconvenience, and omits to state in his bill that he sues on behalf of himself and of the others, having the same interest with himself, the Court will allow the defect to be remedied by amendment, and will at the hearing permit the cause to stand over for that purpose. (*u*)

It is said that the Court will, even after publication, and at any time before hearing, suffer parties to be added by amendment upon a proper cause being shown, and that even after a decree and before it has been enrolled, persons interested may by petition be made parties and let into it, if their right be interwoven with the other plaintiffs and settled (in general) by the decree, they paying the plaintiffs a proportionable part of the charges of the suit. (*w*) And in

(*p*) Hichens v. Congreve, 1 Sim. 500. (*q*) 1 M'Lel. 17.
(*r*) *Vide etiam* Milward v. Oldfield, 4 Price 325.
(*s*) 2 Mer. 71, 74.
(*t*) Milligan v. Mitchell, L. Ch., 5th May, 1836.
(*u*) *Ante*, 336. (*w*) Prac. Reg. 301.

Habergham v. *Vincent*, (*x*) Lord Thurlow intimated an opinion that after a decree had been made, passed and entered, without bringing before the Court a personal representative who had become so after the bill was filed, he might be added by amendment, and that a motion for that purpose would be regular, provided it was merely for the purpose of making him a witness to what was done in the Master's Office, but that, if there was anything in the decree affecting him in the way of order to pay, such an order would be out of the power of the Court.

It is, however, to be observed, that after publication has been passed, and the cause set down for hearing, the bill can be amended in no other respect than by making parties, (*y*) and that an order for leave to amend by adding a plaintiff will *not be granted after replication where the plaintiff has been [*393] guilty of *laches*. (*z*)

If parties are added after witnesses have been examined, the deposition of those witnesses cannot be read against them, as they have had no opportunity of cross-examining such witnesses: (*a*) and if the parties are added after publication passed, the cause as to those parties must be heard upon bill and answer. If, therefore, a plaintiff after publication passed, is advised that it will be necessary to bring other parties before the Court, and in order to do that, must put new matter in issue, he must not proceed by amendment but by supplemental bill. (*b*)

It may be observed here, that it is not considered as any breach of an order to amend by adding parties made at the hearing, that the defendant has brought the necessary parties before the Court by supplemental bill instead of amendment. (*c*)

SECTION IV.

Of the Joinder of Parties who have no Interest in the Suit.

It has been before stated, that no one should be made a party to a suit against whom, if brought to a hearing, there can be no decree; (*d*) thus, an agent for the purchase of an estate, is not a necessary party to a bill against his employer for a specific performance, although he signed the memorandum for the purchase in his own name, (*e*) and so a residuary legatee need not be made a party to a bill against an executor for a debt or legacy, and for the same reason in a bill brought by or against the assignees of a bankrupt or insolvent in respect of the property vested in them, under the bankruptcy or insolvency, the bankrupt or insolvent should not be parties. (*f*) Upon the same principle, persons who are mere witnesses, and may be examined as such, ought *not to be made defendants, (*f*) even though the object of the bill [*394] is to obtain a discovery in aid of an action at law in which their discovery would be more effectual than their examination. (*g*)

(*x*) 1. Ves. jun. 68.
(*y*) Goodwin v. Goodwin, 3. Atk. 370.
(*z*) Milward v. Oldfield, 4. Price 325.
(*a*) Pratt v. Barker, 1 Sim. 1.
(*b*) Goodwin v. Goodwin, 3 Atk. 370; *vide post*. Amendment of Bills and Supplemental Bills.
(*c*) Greenwood v. Atkinson, 5 Sim. 419.
(*d*) 3 P. Wms. 311, n. 1.
(*e*) Kingley v. Young, Coop. Tr. Pl. 42.
(*f*) *Vide ante* Bankrupt Defendants' Parties.
(*f*) Plummer v. May, 1 Ves. 426; How v. Best, 5 Mad. 19.
(*g*) Fenton v. Hughes, 7 Ves. 288.

This rule is, however, liable to exceptions; thus in cases where under certain circumstances a discovery upon oath is desirable from individual members of a corporation aggregate, or from the officers of a corporation, such members or officers may be made defendants; (*h*) with respect to the latter case, it has been observed by Lord Eldon, that "the principle upon which the rule has been adopted is very singular; it originated with Lord Talbot, (*i*) who reasoned thus upon it, that you cannot have a satisfactory answer from a corporation, therefore you make the secretary a party, and get from him the discovery you cannot be sure of having from them, and it is added that the answer of the secretary may enable you to get better information." "The first of these principles," continues his Lordship, "is extremely questionable, if it were now to be considered for the first time; and as to the latter, it is very singular to make a person a defendant in order to enable yourself to deal better, and with more success, with those whom you have a right to put upon the record; but this practice has so universally obtained without objection, that it must be considered established." (*k*)

Other persons are mentioned by Lord Eldon as affording exceptions to the rule before laid down, that mere witnesses cannot be made parties to a suit, viz: agents to sell, auctioneers, &c., who have been made defendants without objection; (*l*) his Lordship, however, appears to have thought that the practice of making such persons parties arose originally from their having some interest, such as holding deposits, which might entitle the plaintiff to relief against them, and it has been since held that an agent who bids at an auction for an estate, and signs the memorandum in his own name for the purchase, need not be made a co-defendant with his employer to a bill for the specific performance of [*395] such agreement. (*m*) In *Dummer* v. *The Corporation* *of *Chippenham*, (*n*) Lord Eldon also mentions as cases of exception to the general rule above referred to, those of arbitrators and attorneys. With respect to arbitrators, however, it is, a rule that in general an arbitrator cannot be made a party to a bill for the purpose of impeaching an award, and that if he is, he may demur to the bill, as well to the discovery as to the relief. (*o*) In some cases, nevertheless, where an award has been impeached on the ground of gross misconduct in the arbitrators, and they have been made parties to the suit, the Court has gone so far as to order them to pay the costs. (*p*) In such cases Lord Redesdale considers it probable that a demurrer to the bill would not have been allowed, (*q*) and in *Lord Lonsdale* v. *Littledale*, (*r*) a demurrer, by an arbitrator, to a bill of this nature was in fact over-ruled, though not expressly upon the ground of the impropriety of making an arbitrator a party, but because the bill charged certain specific acts which showed combination or collusion between him and one of the parties, and made him the agent for such party, and which the Court therefore thought required an answer.

But although arbitrators may be made parties to a bill to set aside their award, they are not bound to answer as to their motives in making the award, and they may plead to that part of the bill in bar of such discovery; (*s*) but it is incumbent upon them, if they are charged with corruption and partiality to support their plea by showing themselves incorrupt and impartial, or otherwise the Court will give a remedy against them by making them pay costs. (*t*)

(*h*) *Vide ante* Corporations, 186.
(*i*) Wych v. Meal, 3 P. Wms. 310.
(*k*) 7 Ves. 289.
(*l*) Ibid.
(*m*) Coop. Tr. P. 42.
(*n*) 14 Ves. 252.
(*o*) Steward v. E. I. Com., 2 Vern. 380; Lord Red. 131.
(*p*) Chicot v. Lequesne, 2 Ves. 315; Lingood v. Croucher, 2 Atk. 395, 501.
(*q*) Lord Red. 131.
(*r*) 2 Ves., jun. 451.
(*s*) Anon. 3 Atk., 644.
(*t*) Lingood v. Croucher, 2 Atk. 396, 501.

From the preceding cases it may be collected that arbitrators can only be made parties to a suit where it is intended to fix them with the payment of costs, in consequence of their corrupt or fraudulent behaviour, and in such cases it is apprehended that the bill ought specifically to pray that relief against them. The same rule also applies to the other case of exception before alluded to, as having been mentioned *by Lord Eldon, namely, that of [*396] attorneys, who can only be made parties to a suit in cases where they have so involved themselves in fraud, that a Court of Equity, although it can give no other relief against them, will order them to pay the costs. Thus, where a solicitor assisted his client in obtaining a fraudulent release from another, he was held to be properly made a party, and liable to costs if his principal was not solvent. (*u*) The same rule applies to any other person acting in the capacity of agent in a fraudulent transaction, as well as to an attorney or solicitor. (*x*) It is to be observed, that in such cases, if an attorney or agent is made a party, the bill must pray that he may pay the costs, otherwise a demurrer will lie. In *Le Texier* v. *The Margravine of Anspach*, (*y*) one of the questions before the Court was, whether a married woman could be made a party to a suit on the allegation, that in certain contracts which were the subject of litigation, she had acted as the agent of her husband, and that she had in her possession vouchers, &c., the discovery of which might assist the plaintiff in his case; the bill, which did not pray any relief against the wife, had been demurred to, and Lord Eldon allowed the demurrer on the ground that she was merely made a defendant for the purpose of discovery, and that no relief was prayed against her. His Lordship said, "I give no judgment as to what would have been the effect if the bill had prayed a delivery to the plaintiff of the vouchers, which are charged to be in the hands of the wife; it is, however, simply as far as relief goes, a bill against the husband only, and against the wife a bill for discovery only. The consequence is, that independent of her character as wife, the case must be considered as one of those in which the Court does sometimes allow persons to be made parties, against whom no relief is prayed, and the only case of that kind is that of the agent of a corporation." With respect to the propriety of making an attorney or agent a party, merely because he has deeds or other documents in his possession, Lord Eldon, in *Fenwick* v. *Reed*, (*z*) observed, *that generally speaking, and *prima facie*, it is certainly not necessary to [*397] make an attorney a party to a bill seeking a discovery and production of title deeds, merely because he has them in his custody, because the possession of the attorney is the possession of his client, but cases may arise to render such a proceeding adviseable, as if he withholds the deeds in his possession, and will not deliver them to his client on his applying for them.

Where a person who has no interest in the subject matter of the suit, and against whom no relief is prayed, is made a party to a suit for the mere purpose of discovery; the proper course for him to adopt, if he wishes to avoid the discovery, is to *demur*. (*a*) If, however, the bill states that the defendant has or claims an interest, a demurrer, which admits the bill to be true, will not of course hold, though the defendant has no interest, and he can then only avoid answering the bill by plea or disclaimer. (*b*)

The question whether a party who is a mere witness can by *answer* protect himself from the discovery required, appears to have given rise to some differ-

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(*u*) Bowles v. Stewart, 1 Sch. & Lef. 227.
(*x*) Bulkeley v. Dunbar, 1 Anst. 37.
(*y*) 15 Ves. 164.
(*z*) 1 Mer. 123.
(*a*) Lord Red 153.
(*b*) Ibid. 153; Plummer v. May, 1 Ves. 426.

ence of opinion. In *Cookson* v. *Ellison*, (c) the plaintiff made a person defendant who was merely a witness, and might have been examined as such, and therefore should have demurred to the bill. Instead of demurring, however, the defendant put in an answer, which not having satisfied the plaintiff as to one interrogatory, an exception was taken, and the Master reported the answer sufficient; but upon the case coming before Lord Thurlow, upon exceptions to the Master's report, his Lordship held that as the defendant had submitted to answer, he was bound to answer fully. In a subsequent case of *Newman* v. *Godfrey*, (d) however, Lord Kenyon appears to have entertained a different opinion. In that case, the defendant, who was a mere clerk, was alleged in the bill to be a party interested in the property in litigation, and in support of such allegation various statements were made, showing in what manner his interest arose; he put in an answer denying *all the statements [*398] upon which the allegation of his being interested was founded, and disclaiming all personal interest in the subject matter; and to this answer exceptions were taken by the plaintiff, because the defendant had not answered the subsequent parts of the bill, which exceptions were disallowed by the Master; and upon the question coming on before Lord Kenyon, M. R., upon exceptions to the Master's report, he thought the Master was right in disallowing the exceptions, because the defendant had reduced himself to a mere witness, by denying his interest and disclaiming; so that even supposing he had an interest he could not, having disclaimed, have availed himself of it. These contradictory decisions have been remarked upon by Lord Eldon in two subsequent cases; (d) and his Lordship's observations in those cases have been considered, as approving of Lord Thurlow's decision in *Cookson* v. *Ellison*. (e) Nothing, however, can be collected from what Lord Eldon has said in either of these cases, as indicating an opinion either one way or the other, and at the period when they were before him, the doctrine that a party could not, except in particular cases, protect himself by answer from making a full answer to all the matters contained in a bill, does not appear to have been so strictly adhered to as it has since been. (f)

When a plaintiff finds that he has made unnecessary parties to his bill, he may either dismiss his bill as against them, or apply to the Court for leave to amend his bill by striking out their names; in either case, however, the order will only be made on payment of their costs, as by striking them out as defendants, the plaintiff deprives them of the opportunity of applying for their costs at the hearing. (g)

The preceding observations, with regard to the joinder in the suit, of persons who have no interest, beneficial or otherwise, in the subject matter, refer to cases where they are made parties defendants; the rule, however, that persons who have no interest in the litigation, cannot be joined in a suit [*399] with *those which have, applies equally to prevent their being joined as co-plaintiffs.

This has been the doctrine of the Court for a great length of time; thus, in the case of *The Mayor and Aldermen of Colchester*, (h) Lord Chancellor Parker said, that although equity goes so far as to give either side leave to examine a defendant *de bene esse*, yet this rule has not been extended to a plaintiff, in

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(c) 2 Bro. C. C. 252. (d) 2 Bro. C. C. 332.
(d) Fenton v. Hughes, 7 Ves. 288; Baker v. Mellish, 11 Ves. 75, 76.
(e) *Supra*.
(f) *Vide* Dolder v. Ld. Huntingfield, 11 Ves. 283; Faulder v. Stuart, ibid, 296; Shaw v. Ching, ib. 303, and *post* Answer.
(g) Wilkinson v. Belsher, 2 Bro. 272, *vide* Pauper.
(h) 1 P. Wms. 595.

which case, if he be an immaterial plaintiff, the defendant may demur. So in *Troughton* v. *Getley*, (*i*) it was said and not denied, that if a plaintiff was an immaterial party the defendant might demur. The same question was twice decided by Sir John Leach when Vice Chancellor. In *Cuff* v. *Platell*, (*k*) a general demurrer was allowed expressly on the ground, that though one of two plaintiffs had an interest in the subject of the suit, the other had no interest in it. In *Makepeace* v. *Haythorne*, (*l*) a defendant pleaded in bar to a bill for an account that one of the plaintiffs was an uncertificated bankrupt; and though the other plaintiff had such an interest as would sustain the suit if he had sued alone, and though the persons named in the plea as assignees of the bankrupt defendant were already parties in respect of some of the transactions mentioned in the pleadings, so that nothing could turn on any alleged want of parties (even if the plea had taken such an objection, which it did not do,) the Vice Chancellor allowed the plea expressly on the ground that one of the parties had no interest in the subject matter of the suit.

The same doctrine was followed by Lord Lyndhurst, C., in the *King of Spain* v. *Machado*, (*m*) in which several plaintiffs having an interest in the matter of the suit were joined with others who had not, but were merely the agents of their co-plaintiffs, and a demurrer to the whole bill was allowed. And in *Page* v. *Townsend*, (*n*) where a bill was filed by four plaintiffs to restrain the piracy of engravings published in this country, and it appeared upon the bill that all four plaintiffs were jointly interested in the plates or designs *from which the engravings were taken, but that two of them only [*400] published them in England for their own benefit, the other two plaintiffs being the publishers of the same engravings in Paris for their own benefit; the Vice Chancellor, Sir L. Shadwell, allowed a demurrer, because two of the plaintiffs only appeared to have an interest in the suit, the publishers in Paris not being represented as having any interest in the work published in Great Britain. (*o*)

But although persons having no interest in the subject matter of a suit, cannot as we have seen be joined as co-plaintiffs, yet where persons having at the time a joint interest, file an original bill, and afterwards one of the co-plaintiffs parts with his interest, such co-plaintiff may afterwards join in a supplemental bill filed for the purpose of bringing additional matter before the Court; because, although he may have parted with his interest in the subject matter, he is still interested in the suit in respect of his liability to costs. Thus, where a bill was filed in the Exchequer by certain persons on behalf of themselves, and other members of a joint stock company, to which an answer was put in and a decree made, setting aside certain contracts between the plaintiffs and the defendant, and directing various accounts and inquiries, and afterwards a supplemental bill was filed in the name of the same plaintiffs against the same defendant, seeking amongst other things a lien on a part of the purchase money, which had been paid to the defendant, to which a plea was put in by the defendant on the ground that one of the plaintiffs in the supplemental bill had, previously to the filing of it, parted with all his interest in the partnership, &c. Lord Lyndhurst, C. B., over-ruled the plea, being of opinion that the supplemental bill was nothing more than a continuation of the original bill, and his Lordship's decision was afterwards confirmed by Lord Abinger, C. B. upon a re-hearing. (*p*)

It is to be observed that the common case of joining an auctioneer and the vendor in a bill against a purchaser, is no exception to the rule above referred

(*i*) 1 Dick. 382.
(*k*) 4 Russ. 242.
(*l*) 4 Russ. 244.
(*m*) Ibid. 225.
(*n*) 5 Sim. 395.
(*o*) *Vide etiam* Delondre v. Shaw, 2 Sim. 237.
(*p*) Small v. Attwood, 1 Young & Collier, 39.

[*401] to, because the auctioneer *has an interest in the contract, and may bring an action upon it; he is also interested in being protected from the legal liability which he has incurred in an action by the purchaser to recover the deposit. Nor does the circumstance of the assignor and the assignee of a *chose* in action being capable of suing together constitute an exception, because, although the assignor has parted with his beneficial interest in the subject matter, he still is interested as the owner of the legal estate. (*q*)

If the fact of one of the plaintiffs having no interest in the suit, appears upon the bill, advantage must be taken of it by demurrer. (*r*) If the fact does not appear upon the bill it may be brought forward by plea. (*s*)

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*CHAPTER VI.

OF THE BILL.

SECT. I.—*Of the different sorts of Bills.*

IT has been before observed, that a suit on the equity side of the Court of Chancery is commenced on behalf of a subject by preferring what is termed an *English bill.* If commenced by the Attorney General on behalf of the crown, or of those partaking of its prerogatives, or under its protection, the commencement of the suit is by *information.* (*a*)

English bills, if they relate to matters which have not before been brought before the consideration of the Court, are called original bills, and form the foundation of most of the proceedings before what is termed the extraordinary or equitable jurisdiction of the Court of Chancery. The same form of instituting a suit is also in use on the equity side of the Court of Exchequer, and in all other equitable jurisdictions in the kingdom.

Besides original bills, there are other bills in use in Courts of Equity, which are preferred when it becomes necessary to supply any defects which may exist either in the form of the original bill, or may have been produced by events subsequent to the filing of it. Bills of this description are called bills which are not original. Sometimes a person, not a party to the original suit, seeks to bring the proceedings and decree in the original suit before the Court, for the purpose either of obtaining the benefit of it, or of procuring the reversal of the decision which has been made in it. The bill which he prefers for this purpose, is styled a bill in the nature of an original bill.

Besides the different divisions of bills here enumerated, original bills are usually divided into 1, original bills praying relief, and 2, original bills not praying relief. (*b*)

[*403] *Original bills praying relief, are again subdivided into three heads: 1. Original bills, praying the decree of the Court touching some right claimed by the person exhibiting the bill, in opposition to rights

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(*q*) Ryan v. Anderson, 3 Mad. 174.

(*r*) Cuff v. Platel, King of Spain v. Machado, Page v. Townsend, Delondre v. Shaw, *ubi supra.*

(*s*) Makepeace v. Haythorn, *ubi supra.* (*a*) *Ante,* Chap. 1.

(*b*) Ld. R. 29.

claimed by the person against whom the bill is exhibited. 2. Bills of interpleader; and, 3. Certiorari bills. (b)

Original bills not praying relief, are of two kinds: 1. Bills to perpetuate the testimony of witnesses; 2. Bills of discovery.

As original bills of the first kind are those most usually exhibited, the reader's attention will in the present chapter be principally directed to them; the other descriptions of bills will be more particularly considered when we come to consider the practice of the Court applicable to the particular suits of which they are the foundation.

Bills which are not original, or which are merely in the nature of original bills, together with informations by the Attorney General, will be separately considered in a future part of the work.

SECTION II.

Of the Authority to file a Bill.

The first step to be taken by a party who proposes to institute a suit in Chancery, is to authorize a solicitor practising in the Court to commence and conduct it on his behalf. It does not seem to be necessary that such authority should be in writing, (c) although it would, perhaps, be better that solicitors before they commence suits should be in possession of some written authority for that purpose; but in either case, in order to warrant a solicitor in filing a bill, the authority, be it in writing or by *parol*, ought to be special; and it has been held that a general authority to act as solicitor for a party, will not be sufficient to warrant his commencing a suit on his behalf, (d) although, under a general authority, a solicitor may defend a suit for his client. (e)

*The rule which requires a solicitor to be specially authorized to commence a suit on behalf of his client, applies as well to cases [*404] where the party is to sue as a co-plaintiff, as to cases where he is to sue alone; and even to cases where his name is merely made use of *pro forma*. In *Wilson* v. *Wilson*, (f) Lord Eldon said, "I cannot agree that making a person a plaintiff is only *pro forma*; and I am disposed to go a great way in such cases, for it is too much for solicitors to take upon themselves to make persons parties to suits, without a clear authority; there are very great mischiefs arising from it."

If a solicitor files a bill in the name of his client, without having a proper authority from him for so doing, the course for the client to pursue, if he wishes to get rid of the suit, is to move that the bill may be dismissed with costs, to be paid not by the plaintiff, but by the solicitor filing the bill. This motion may be made by the plaintiff in person, or he may, by warrant under his hand and seal, disclaim the bill as being brought without his order or privity, or against his order, though with his privity, and empower some counsel to make the motion; (g) in which case, after the motion is made, the warrant must be delivered to the registrar, and the Court will order it to be filed. (h) If a bill be exhibited in the name of a married woman against her husband, it may, upon affidavit that she knew nothing of it, or had not consented to it, be dismissed. (i) A motion to dismiss a bill, as having been filed without the privity

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(b) Ld. R. 29.
(c) Lord v. Kellett, 2 Milne & K. 1.
(d) Wilson v. Wilson, 1 Jac. & W. 457.
(e) Wright v. Castle, 3 Mer. 12.
(f) *Ubi supra.*
(g) Prac. Reg. 179.
(h) Ibid.
(i) Ibid. 60.

or consent of the plaintiff, must be accompanied by an affidavit of the plaintiff himself, that the bill had been filed without any authority from him; and to avoid the effect of such an application, the solicitor against whom it is made must show distinctly, upon affidavit, that he had a special authority from the party to institute the suit; and it will not be sufficient to assert generally, in opposition to the plaintiff's affidavit, that authority had been given. In *Wright* v. *Castle*, (*k*) the affidavit of the plaintiff was met by another on the part of the [*405] solicitor, stating, that an action *had been brought by the defendant against the plaintiff, on account of certain promissory notes, to restrain proceedings in which action the bill had been filed, although not by the express directions of the plaintiff, yet in the course of business, and by virtue of a general authority under which he acted as the plaintiff's solicitor; but Lord Eldon did not consider such authority sufficient.

If the name of a person is made use of in a bill as co-plaintiff with others without his consent, such person may move that his name may be struck out, and that the solicitor who filed the bill may be ordered to pay the costs; (*l*) such a motion, however, should be made at the earliest possible opportunity after the fact has come to the plaintiff's knowledge; and if there has been acquiescence or *laches*, on the part of the plaintiff making the application, it will not be granted. In *Dundas* v. *Dutens*, (*m*) a motion was made on the part of Sir T. Dundas, one of the co-plaintiffs, that his name might be struck out from being a plaintiff, upon an affidavit that he had never given the solicitor any authority to use his name in the suit; but the Lord Chancellor (Lord Thurlow) did not immediately grant the motion, and directed it to stand over till the hearing of the cause. Upon the hearing, the bill was dismissed with costs, to be paid to the defendants by all the plaintiffs; but with respect to the motion of Sir T. Dundas, it was ordered that it should be referred to the Master, to enquire what costs and expenses the plaintiff, Sir T. Dundas, had been put to; and that the plaintiff's solicitor should pay to Sir Thomas Dundas what the Master should find due for his costs and expenses.

It is to be observed, that in the above case the Court appeared to think that there had been considerable *laches* on the part of Sir Thomas Dundas, and his Lordship said that it was scarcely to be imagined that the suit should have been so may years in Court without his knowing that his name stood as the first plaintiff in the cause; for the bill had been filed four or five years before, and Sir Thomas Dundas had made no complaint until a few days previously to the [*406] hearing; and *that, therefore, under the circumstances, the utmost the Court was called upon to do, was to make the solicitor pay Sir Thomas Dundas's share of the taxed costs. (*n*) In *Titterton* v. *Osborne*, (*o*) Lord Northington appears to have made a similar order, although the plaintiff stated that, till then, he was ignorant of the suit, and that his name was inserted without his privity or consent, his Lordship being of opinion that were he to grant the motion then (*i. e.* before the hearing) it would tend only to derange the cause, and impede the hearing.

In a recent case, (*p*) where a co-plaintiff was not apprised that his name had been made use of without his authority till after the bill had been dismissed with costs, and he was served with a *subpœna* to pay them, Lord Eldon, upon motion, ordered the solicitor to pay to the defendant the costs, which were ordered to be paid by the plaintiffs to the defendant; and also to pay to the plaintiff who made the application his costs of the application, as between soli-

(*k*) *Supra.*
(*l*) Wilson v. Wilson, 1, Jac. & W. 457.
(*m*) 2 Cox. 235, 1 Ves. J. 196, S. C.
(*n*) 2 Cox. 240.
(*o*) 1 Dick. 351.
(*p*) Wade v. Stanley, 1, Jac. & W. 674.

citor and client. It is to be observed that, by the order made upon that occasion, the solicitor was ordered to pay the whole costs to be paid by all the plaintiffs to the defendants; but he was to be at liberty to make any application as to those costs as against the other plaintiffs as he should be advised. (q)

As connected with this subject, it may be noticed here, that in certain cases it is necessary, before a suit is commenced, to obtain the sanction of the Court to its institution. The cases in which this is most usually done, are those in which the suit contemplated is for the benefit of an estate, which is already the subject of a proceeding in Court, and the expenses of which are to be paid out of such estate. Thus, where there is a suit pending for the administration of *assets*, and it becomes necessary, in order to get in the estate, that a suit should be instituted against a debtor to the estate; in such cases it is usual for the personal representative, previously to filing a bill, to apply in the administration suit for *leave of the Court to exhibit a Bill for that purpose. And so, where a suit has been instituted for winding up partnership accounts [*407] upon a dissolution, and a receiver has been appointed to collect the outstanding effects, if it is necessary in order to recover a debt due to the partnership, that the receiver should institute a suit for that purpose, application should be made to the Court, on the part of some of the parties, that the receiver may be at liberty to file the necessary bill in the names of the partners. It is to be observed that, in all such cases, the Court will not direct the institution of such a suit upon motion, although supported by affidavits, without previously referring it to the Master to enquire whether it will be for the benefit of the parties at whose joint expense it is to be; unless the other parties interested, being of age, and competent to consent, choose to waive such reference. (r)

In the same manner where the property of an infant is the subject of a suit already depending, and it becomes necessary that another suit should be instituted on behalf of the infant, it is usual before any steps are taken in it, to procure a reference to the Master to enquire and state to the Court whether such contemplated proceedings will be for the benefit of the infant. (s) It is to be observed, however, that such reference can only be made where the property of the infant is already subject to the control and disposition of the Court in another suit; and that, in ordinary cases, where a person commences an original proceeding on behalf of an infant as a *prochein amy*, he is considered as taking upon himself the whole responsibility of it; nor will the Court, either before or after the commencement of the proceeding, grant a reference to the Master to enquire whether it will be for the infant's benefit at the instance of the *prochein amy* himself, (unless in cases where there are two or more suits brought by different next friends for the same object,) although, as we have seen, it will sometimes do so at the instance of other parties. (t)

It has been before stated, that the committee of an idiot or lunatic ought previously to instituting a suit on his behalf, to obtain the sanction of the Lord Chancellor to the proceeding, *by petition under the commission; (u) and that in the case of suits by the assignees of bankrupts, or insol- [*408] vent debtors, it is necessary, previously to instituting the suit, to procure the sanction of the majority of the creditors in the manner pointed out by the Bank-

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(q) Reg. Lib. B. 1819 for 1835.
(s) *Vide ante* 97.
(u) *Ante* 117.
(r) Musgrave v. Medex, 3 V. & B. 167.
(t) *Ante* 95.

rupt Act, 6 Geo. 4, c. 16, s. 88; (x) and the Insolvent Debtor's Act, 1. Geo. 4, c. 119, s. 11. (y)

It is to be observed, that, with respect to all the above mentioned cases, in which it is stated to be right, previously to the institution of a suit, to obtain the proper sanction, the omission to obtain such sanction is not a ground upon which a defendant to the suit can object to its proceeding. Some doubt appears, as we have seen, to have existed upon this point with reference to suits commenced by the assignees of bankrupts or insolvent debtors; but that appears to have been completely set at rest by the decision of Sir J. Leach, in *Piercy* v. *Roberts*; (z) which has been before referred to, (a) and by a more recent decision of the Vice Chancellor, (Sir L. Shadwell) in *Casborne* v. *Barsham*. (b)

SECTION III.

By whom Prepared.

THE solicitor being duly authorized, the next step in the institution of a suit is to have the bill properly prepared. The duty of drawing the bill ought, strictly, to be performed by the solicitor, who is allowed a fee for so doing; (c) but as the rules of the Court require that the draft should be signed by counsel, who is held to be responsible for its contents, and, as much of the subsequent success of the suit may depend upon the manner in which the bill is framed, it has been found more convenient in practice that the bill should be prepared, as well as signed, by counsel; and, accordingly, except in particular cases, instead of the draft of the bill being prepared by the solicitor, and laid before counsel for his perusal and signature, *the instructions to prepare the bill are [*409] generally, in the first instance, laid before the counsel, who prepares the draft from those instructions, and afterwards affixes his signature to it.

The practice of counsel signing pleadings in Chancery began, as it is said, in Sir Thomas More's time, previously to which, it seems, the practice was, for the bill to be examined by one of the Masters in Chancery, in order that he might consider whether the matter contained therein was fitter to be dismissed by original or retained by subpœna, (d) but, however the practice began, the rule is now imperative that the signature of counsel must be subscribed, either to the draft or the engrossment of every bill before it is filed; (e) if it be not, or the hand be counterfeit or disowned, the bill will be dismissed on the defendant's demurrer. (f) Thus, in *Kirkley* v. *Burton* (g) a demurrer was put in to an amended bill, because the name of counsel did not appear to the bill; and the Vice Chancellor (Sir J. Leach) held that, as the objection appeared upon the record, the defendant might well allege, by demurrer, that he was not bound to answer the bill; and he likened it to the case of a demurrer, for want of an affidavit, to an interpleader bill, or to a bill to transfer a litigation from law to equity, upon the ground of a lost instrument. The Vice Chancellor, however, gave the defendant liberty to add, the name of the gentleman who had signed the draft, to the record.

(x) *Ante* 80.
(z) 1 M. & K. 8.
(b) 6 Sim. 317.
(d) Treatise on Masters of the Chauncerie, 1 Harg. Law Tracts, 302.
(e) Lord Red. 39.
(g) 5 Mad. 378.
(y) *Ante* 84.
(a) *Ante* 83.
(c) 1 Turner & Ven. p. 3.
(f) Prax. Alen. 3.

If it appear to the Court, upon inspection of the record or the office copy, that the bill has not been signed by counsel, the Court will, of its own accord, order it to be taken off the file. (*h*)

The usual course, however, in such a case, appears to be for the defendant to move that the bill may be taken off the file, and that the costs may be paid by the plaintiff. Upon such a motion if any doubt arises as to whether the bill has been signed by counsel or not, the Court will refer it to the Master to inquire into the fact; and if he certifies that it was not signed by counsel, the bill will be ordered to be taken *off the file and suppressed, and the plaintiff directed to pay the defendant his costs, to be taxed, &c. (*i*) [*410]

Where it appeared that a solicitor had forged a counsel's name to a pleading, he was fined 20*l.*, and committed till the fine was paid. The plaintiff was also fined 100*l.* (*k*)

The signature of counsel is necessary to an amended bill as well as to an original bill. (*l*) Where, however, the same counsel who signed the original bill amends his former draft, which has his signature, it is not necessary that he should sign the draft again, as the signature will be applied as well to the amendments as to the former draft: nor is it necessary that there should be a second signature to the record. But if the amendments are made by another counsel, then it is necessary that there should be a second signature either to the draft or to the engrossment. (*m*)

The want of the signature of counsel to an amended bill is, as we have seen, good cause of demurrer. (*n*) The defendant may also move to have it taken off the file. Thus, when a plaintiff, having obtained an order to amend, went himself to the Six Clerks' Office, unaccompanied by any solicitor, and having got access to the engrossment of the bill, amended it by making several interlineations, and it appeared that the amendments were not made from any draft signed by counsel, nor was the name of counsel repeated on the engrossment as having sanctioned the amendments; the Vice Chancellor ordered the amended bill to be taken off the file, and the plaintiff to pay the costs. (*o*)

By one of the orders of the Court, usually called Lord Clarendon's Orders, it is ordered "that no counsellor do put his hand to any bill, answer or other pleading, unless it be drawn or at least perused by himself in the paper draft, before it is engrossed; (which they shall do well, for their own discharge, to sign also after perusal) and counsel are to take care that the same be not stuffed with repetition of deeds, writings or records, in *hæc verba;* but the effect and substance of so much of *them only as is pertinent and material to set down, and that in brief terms, without long and needless traverses of points not traversable, tautologies, multiplication of words, or other impertinencies, occasioning needless prolixity, to the end that the ancient brevity and succinctness in bills and other pleadings may be restored and observed; much less may any counsel insert therein matter merely criminous or scandalous, under the penalty of good costs to be laid on such counsel, to be paid to the party grieved, before such counsel can be heard in Court." (*p*) [*411]

In a case (*q*) where the plaintiff had inserted in his bill scandalous matter against one of the defendants, it was referred to the Master to tax the costs of such scandal, and the Master taxed such costs at 100*l.*, but the Court and the

(*h*) French v. Dear, 5 Ves. 547.
(*i*) Dillon v. Francis, 1 Dick. 68.
(*k*) Whitlock v. Marriot, 1 Dick. 16.
(*l*) Kirkley v. Burton, 5 Mad. 378.
(*m*) Webster v. Threlfall, 1 S. & S. 135.
(*n*) Kirkley v. Burton, *supra*.
(*o*) Pitt v. Macklew, 1 S. & S. 136, n.
(*p*) Ord. in Ch. Edit. Beames, 165.
(*q*) Emerson v. Dallison, 1 Ch. R. 194.

Judges declared that the scandal was very great, yet, nevertheless, ordered that the costs should be reduced to 50*l.*, to be paid by the plaintiff to the defendant; *and also that* 5*l. more should be paid by Mr. Welcome, whose hand was set to the bill.*

SECTION IV.

Of the Matter of a Bill.

An original bill in Chancery is in the nature of a declaration at common law, (*r*) or of a libel and allegation in the Spiritual Courts. (*s*)

It was, in its origin, nothing but a petition to the King, which, after being presented, was referred to the Lord Chancellor, as the keeper of his conscience; and a bill still continues to be framed in the nature and style of a petition, though it is now, in the first instance, generally addressed to the Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the Great Seal. (*t*)

Where a bill prays the decree of the Court, touching rights claimed by the [*412] person exhibiting it in opposition to rights *claimed by the person against whom it is exhibited, it must contain a statement showing the rights of the plaintiff or person exhibiting the bill, by whom and in what manner he is injured, or in what he wants the assistance of the Court; and a prayer for relief suitable to his case, and for that purpose that the process of the Court may issue to bring before it the parties complained of. This statement and prayer form the substance and essence of every bill; but, in ordinary bills, other parts have been introduced in practice which, although of a more formal nature, are, nevertheless, necessary to the constitution of a well-drawn bill. These parts will form the subject of a future section; but, before entering into the consideration of the form of a bill, the reader's attention should first be drawn to certain general rules and principles by which persons framing bills ought to be guided in the performance of their task.

In the first place, it is to be observed, that every bill must show clearly that the plaintiff has a right to the thing demanded, or such an interest in the subject matter as gives him a right to institute a suit concerning it. (*u*)

It would be foreign to the purpose of this work to attempt the enumeration of the various cases in which bills have been dismissed, because filed by parties having no interest in the subject matter or no right to institute proceedings concerning it; to do so, indeed, would necessarily lead to the consideration of the general principles of equity, and would be more fitting for a treatise upon the equitable jurisdiction of the Court than for a book upon its practice. All that need now be said upon this subject is, that if it is not shown by the bill that the party suing has an interest in the subject matter, and a proper title to institute a suit concerning it, the defendant may demur; (*x*) therefore, where, before the removal of the disabilities affecting persons professing the Roman Catholic religion, a Protestant next of kin, claimed a rent-charge, settled upon a Papist at her marriage, (*y*) a demurrer was allowed, for the plaintiff had evidently no [*413] right to the thing which he demanded by his *bill because, under the laws then in force, (*z*) a Papist was incapable of taking by pur-

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(*r*) 3 Bl. Com. 442.
(*t*) Cowp. Ch. Pl. 3.
(*x*) Ibid.
(*z*) 11 & 12 W. 3, c. 4.
(*s*) Ibid. Gilb. For. Rom. 44.
(*u*) Lord Red. 125.
(*y*) Michaux v. Grove, 2 Atk. 210.

chase, and the grant of the rent-charge was therefore utterly void. (*a*) And so where a plaintiff claimed under a will, and it was apparent, upon the construction of the instrument, that he had no title, a demurrer was allowed. (*b*) In *Brownsword* v. *Edwards*, (*c*) which is the case referred to in Lord Redesdale, in support of the above proposition, Lord Hardwicke is reported to have said that, if, upon arguing the demurrer, the Court had not been satisfied, and had therefore been desirous that the matter should be more fully debated at a deliberate hearing, the demurrer would have been over-ruled without prejudice to the defendant's insisting on the same matter by way of answer; but, in a note to his treatise, (*d*) Lord Redesdale observes that, "perhaps this declaration fell from the Court rather incautiously; as a dry question upon the construction of a will may be as deliberately determined upon argument of a demurrer, as upon the hearing of a cause in the ordinary course, and the difference in expense to the parties may be considerable." Of the truth of this observation there can be no doubt; and it is much to be wished that, in cases of this description, where the right of the plaintiff in the subject matter of the suit depends upon a simple point, such as that of the construction of a will, the practice of demurring to the bill were more frequently resorted to, as by such means the great expenses attendant upon many causes, especially testamentary causes, might frequently be saved to the parties; since it often occurs in practice that, owing to the plaintiff's case not having been met in the first instance by a demurrer, and to the rule of the Court not to decide upon questions of this nature till it is satisfied that all persons interested in the discussion have been brought before it, the parties, or at least the testator's estate, are put to great expense for the purpose of submitting the matter properly to the Court; when, ultimately, if it appears *that the party filing the bill is not right in the construction [*414] he puts upon the instrument, the bill must be dismissed; which, if the plaintiff's bill had been demurred to in the first instance, would have been the result, without the great additional increase of expense caused by the other proceeding.

The rule, which requires a plaintiff to show by his bill an interest in the subject matter of the suit, applies not to one plaintiff only, but to all the plaintiffs; and if several persons join in filing a bill, and it appears that one of them has no interest, the bill will be open to demurrer, though it appear that all the other plaintiffs have an interest in the matter, and a right to institute a suit concerning it. (*e*)

The plaintiffs in a suit must not only show an interest in the subject matter, but it must be an actual existing interest; a mere possibility, or even probability, of a future title will not be sufficient to sustain a bill; (*f*) therefore, where a plaintiff claiming as a devisee in the will of a person who was living, but a lunatic, brought a bill to perpetuate the testimony of witnesses to the will, against the presumptive heir-at-law, (*g*) and were persons who would have been entitled to the personal estate of a lunatic, if he had been then dead intestate, as his next of kin, supposing him legitimate, brought a bill in the lifetime of the

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(*a*) Lord Red. 125.
(*b*) Beech v. Crull, Prec. Ch. 588, 2 Bro. P. C. 468, S. C.
(*c*) 2 Ves. 243, 248. (*d*) Lord Red. 125, n. (*o*).
(*e*) The Mayor and Aldermen of Colchester, v. ———, 1 P. Wms. 595; Throughton v. Getley, 1 Dick. 382; Cuff v. Platell, 4 Russ. 242; Makepeace v. Haythorne, ib. 244; King of Spain v. Machado, ib. 225; Delondre v. Shaw, 2 Sim. 237; Page v. Townsend, 5 Sim. 395. *Vide ante.*
(*f*) Lord Red. 127.
(*g*) Sackvill v. Ayleworth, 1 Vern. 105; Ex. ca. ab. 234, Pl. 3, *vide etiam*, 2 Prax. Alm. 500, where there is a form of a demurrer.

lunatic to perpetuate the testimony of witnesses to his legitimacy, against the Attorney General, as supporting the rights of the Crown, (*h*) demurrers were allowed. For the parties in these cases had no interest which could be the subject of a suit; they sustained no character under which they could afterwards sue, and therefore the depositions, if taken, would have been wholly nugatory. Upon the same principle it has been held that a bill cannot be sustained by a purchaser from a contingent remainder-man of *his [*415] interest in the property, against a tenant for life, for inspection of title deeds, &c., although a bill would lie for that purpose by a person entitled to a vested remainder. (*i*)

A bill filed by a person who filled the character of tenant in tail in remainder and his children, to perpetuate testimony to the marriage of the tenant in tail, could not be supported, because the father, being confessedly tenant in tail in remainder, could have no interest whatever in proving the fact of his own marriage, the remainder in tail being vested in him, and the other plaintiffs (the children) were neither tenants in tail nor remainder-men in tail, but the issue of a person who was *de facto* and *de jure* tenant in remainder in tail, leaving the whole interest in him, and consequently the children had no interest in them, in respect of which they could maintain their bill. (*k*) Upon the same principle, where the dignity of Earl was entailed upon an individual who died, leaving two sons, the eldest of whom inherited the dignity, upon a bill filed by his eldest son, in his lifetime, against the second son of the first Earl and the Attorney General, to perpetuate testimony as to his father's marriage, a demurrer was allowed. (*l*)

Where, however, a party has an interest, "it is perfectly immaterial how minute such interest may be, or how distant the possibility of the possession of that minute interest, if it is a present interest. A present interest, the enjoyment of which may depend upon the most remote and improbable contingency, is, nevertheless, a present estate; and as in the case upon Lord Berkeley's will, (*m*) though the interest may, with reference to the chance, be worth nothing, yet it is in contemplation of law an estate and interest, upon which a bill may be supported." (*n*)

But although a plaintiff may have a present estate or interest, yet if his interest is such that it may be barred or defeated by the act of the defendant, he [*416] cannot support a bill, as in the case put by Lord Eldon in *Lord Durseley* v. **Fitzhardinge*, (*o*) of a remainder-man filing a bill to perpetuate testimony against a tenant in tail. To such a bill it seems the tenant in tail might demur, upon the ground that he may at any time suffer a recovery, which would destroy the remainder, and deprive the plaintiff of his interest.

A plaintiff must not only show in his bill an interest in the subject matter of the suit, but he must also make it appear that he has a proper title to institute a suit concerning it; (*p*) for it very often happens that a person may have an interest in the subject matter, and yet, for want of compliance with some requisite forms, he may not be entitled to institute a suit relating to it. Thus, for instance, the executor of a deceased person has an interest in all the personal property of his testator; but, till he has proved the will, he has no right to assert his right in a court of justice. If, therefore, a man files a bill as exe-

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(*h*) Smith v. Attorney General, Lord Red. 127, 1 Vern. 105; Ed. Raithby, *notis cited*, 6 Ves. 255.

(*i*) Noel v. Ward. 1 Mad. 323.

(*k*) Allan v. Allan, 15 Ves. 130.

(*l*) Earl of Belfast v. Chichester, 2 J. & W. 439.

(*m*) Lord Dursley v. Fitzhardinge, 6 Ves. 251.

(*n*) *Per* Lord Eldon, in Allan v. Allan, 15 Ves. 136.

(*o*) 6 Ves. 262.

(*p*) Lord Red. 126.

cutor, and does not state in it that he has proved the will in the proper court, the bill will be liable to demurrer. (q) It is sufficient, however, to allege in the bill that the plaintiff has proved the will in the proper Court, without mentioning the Court in which it was proved. (r) It is said "that Lord Keeper North, when first he came into the Court of Chancery, was of opinion that a plaintiff administrator ought to show by his bill where he had taken out administration, to the intent that the defendant might be informed in what Court to look for it, as it might be void, if taken out under a wrong jurisdiction; but that, of late, the general allegation of having taken out administration has been held good, and was so determined by Lord King, in the case of *Stone* v. *Baker*. (s)

With reference to this point, it is to be observed that if a plaintiff takes upon himself to state upon his bill the Court in which he has proved the will, or taken out administration, and it appears to have been an improper or insufficient Court, he will not show a complete title to sue, and a demurrer will hold. (t) Thus, where the plaintiffs sued upon administrations obtained in *the Spiritual Court at Paris, a demurrer was allowed by Lord Hardwicke, because the Court here can take no notice of what is done in the Spiritual Courts beyond sea. (u) And so, in a suit by an executor, where a testator has *bona notabilia* in divers dioceses, and the bill shows that the will has been proved in one of those dioceses, the plaintiff's title will not be complete, because the proof ought to have been in the Archbishop's Court. (x) From a recent case, as it stands reported, it appears that the late Master of the Rolls (Sir J. Leach) was of opinion that the probate of a will in a subordinate jurisdiction, even where there were no *bona notabilia*, would not be sufficient to entitle the executor of a deceased creditor to a decree for an account of his debtor's estate; and that the executor must, before the decree is pronounced, be armed with a prerogative probate. (y) In that case, however, his Honor appears to have proceeded on a mistaken view of the rule, that the Accountant General cannot pay money out of Court without a prerogative probate. (z) That rule is applicable only to cases where there is money already in Court, and the party entitled to that money dies before he receives it; in such cases, the Court requires a prorogative probate, and will not direct the money to be paid out on a diocesan probate, because the fund itself being in Court at the same time that the death of the party took place in a country diocese shows that there are *bona notabilia* in divers dioceses, and, consequently, that a prerogative is the competent probate; (a) but where a party, entitled to relief as the executor or administrator of a person who died in a particular diocese without leaving *bona notabilia* in different dioceses, claims under a probate or administration granted in the particular diocese, and in the course of the cause the fund in question is brought into Court, it would be extremely unreasonable to require that, in order to entitle *himself to get the money out of Court, he should take out a fresh probate or letters of administration in the Prerogative Court. (b) Payment into Court is a precautionary measure,

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(q) Humphreys v. Ingledon, 1 P. Wms. 752.
(r) Ibid.
(s) 13 Dec. 1732, ibid. n.
(t) Lord Red. 126.
(u) Tourton v. Flower, 3 P. Wms. 369.
(x) Comber's Case, 1 P. Wms. 767.
(y) Young v. Elworthy, 1 M. & K. 215.
(z) Challnor v. Murhall, 6 Ves. 118; Newman v. Hodgson, 7 Ves. 409; Thomas v. Davies, 12 Ves. 417.
(a) Per Sir J. Nicholl, in Scarth v. Bishop of London, 1 Hag. 625, 636.
(b) It seems, from the above case of Scarth v. the Bishop of London, that, when money is in the public funds, and the party dies out of England, the Archbishop of Canterbury and Bishop of London have a concurrent jurisdiction to grant probate; and that, although when a party dies within a diocesan jurisdiction, without *bona notabilia*, the Prerogative Court

and does not affect the rights and interests of any of the parties litigating; therefore, if a plaintiff, at the time he files his bill, has a proper title to maintain the suit, the mere fact of the money being brought into Court for its better security, ought not to alter that title and render it necessary for him to seek a new one. (c) This view of the case was adopted by Lord Cottenham, upon a motion made before him for the discharge of a prisoner in custody for a contempt, in not obeying a decree by which he was ordered to pay money into Court. One of the grounds of the application for his discharge was that, on the death of one of the plaintiffs, the proceedings had been improperly revived at the instance of a plaintiff who had taken out administration in the province of York, and his Lordship expressed his opinion to be that when there are no *bona notabilia* at the death of a testator or intestate, probate or administration by the Provincial Court is sufficient to entitle a plaintiff to maintain his suit. (d)

The same opinion had been expressed, a few days before, by Lord Langdale, M. R., upon the hearing of a demurrer to another bill of revivor in the same suit. The original bill had been filed, for the purpose of redeeming a mortgage of an estate in Yorkshire, by parties claiming under a devise by the mortgagor, by which it had been directed to be converted into personal estate for payment [*419] of debts. It *appeared, in the course of the proceedings, that the defendants were mortgagees in possession, over-paid, and that a considerable sum was due from them for rents and profits received after the mortgage had been paid off, which, by the decree on further directions, they had been ordered to pay into Court. Upon the death of one of the plaintiffs to the suit, a bill of revivor was filed by the surviving plaintiffs and by the administrator of the deceased plaintiff, claiming under a probate from the Prerogative Court of York, to which bill a demurrer was filed, one of the grounds of demurrer being that there ought to have been an administration either from the Prerogative Court of Canterbury or from the Diocesan Court of London, and the above case of *Young* v. *Elworthy* was cited in support of the demurrer; but the Master of the Rolls expressed himself to be of opinion that, at all events, for the purpose of filing the bill of revivor, (there being then no money in Court,) the York administration was sufficient, and over-ruled the demurrer. (e)

With reference to the above point, it is to be observed that, in order to complete the title of a plaintiff as a derivative executor, it is not necessary that the will of the original testator and that of his executor should be proved in the same Court; (f) and where the will of the original testator had been proved in the Prerogative Court by two of his executors, both of whom died, and the executors of the survivor, upon the death of their testator, as he had not *bona notabilia*, proved the will in the Consistory Court of Llandaff, Sir John Leach, M. R., upon a question being raised whether the representation to the original testator was complete, directed that the case should stand over, in order that the opinion of a civilian might be taken, and that inquiry might be made as to the practice and doctrine of the Ecclesiastical Courts on the subject. A case

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will not usually grant probate; yet, in order to aid the ends of justice, it will, if necessary, grant an *additional* probate, limited to the recovery of the property sought. *Vide* Yockney v. Foyster, 1 Hag. 631, n.; and Sir John Nicholl's observations upon the same case, ib. page 636.

(c) Upon the above case of Young v. Elworthy being cited before Lord Brougham, Ch. Mr. Colville, the Registrar, stated that the late Master of the Rolls had subsequently changed his opinion upon the point, and directed the decree to be drawn up; and this statement was acted upon by his Lordship, who observed that the distinction was obvious; MSS. 10 Nov. 1834.

(d) Wilson v. Metcalfe, 11 March, 1836, MSS.

(e) Metcalfe v. Metcalfe, 1 Keen, 74.

(f) Wankford v. Wankford, 1 Salk. 299–309.

was accordingly submitted to Dr. Lushington, who expressed his opinion to be that the executors of the surviving executor had *not* clothed themselves with the legal character of personal representatives *of the original testator, admitting however that there was no express authority upon the question. The Master of the Rolls, nevertheless, was inclined to think that the chain of representation was complete; and, on a subsequent day, his Honor decreed accordingly. (g) [*420]

If an executor, before probate, file a bill, alleging that he has proved the will in a proper Ecclesiastical Court, such allegation will obviate a demurrer; (h) he must, however, prove the will before the hearing of the cause, and then the probate will be sufficient to support the bill, although it bear date subsequently to the filing of it. (i) In this respect, Courts of Equity differ from Courts of Law; for at law an executor cannot maintain actions before probate, unless such as are founded on *actual* possession; because in actions where he sues in his representative character, he is bound, when he declares, to make *profert* of the letters testamentary; otherwise the defendant may demur. (k) The same distinction also prevails between the practice of Courts of Law and Courts of Equity with respect to administrators; for in equity a plaintiff may file a bill as administrator before he has taken out letters of administration, and it will be sufficient to have them at the hearing, (l) which is not the case at law.

It is to be observed that, although an executor or administrator may, before probate or administration granted, file a bill relating to the property of the deceased, and such bill will not on that account be the subject of demurrer, provided the granting of probate or of letters of administration, by the proper Ecclesiastical Court, be alleged in the bill, yet a defendant may take advantage of the fact not being as stated in the bill, by plea; thus, in *Simons* v. *Milman*, (m) where letters of administration had been granted to the defendant under the idea that the deceased had died intestate, whereas, in fact, he had made a will and appointed the plaintiff his executor, who before probate, filed a bill, for the purpose of *recovering part of the assets of the testator from the defendant, alleging that probate of the will had been granted to him, to which bill the defendant put in a plea stating that such was not fact; the Vice Chancellor (Sir A. Hart) allowed the plea. At law, however, it seems that a defendant cannot plead, to an action brought by an executor, that the plaintiff has not proved the will, though he may demur if the plaintiff does not, in his declaration, show the probate. (n) The reason of this is that the right of the executor is derived from the will and not from the probate, which only completes the incipient title. With respect to an administrator, however, it is different; for the administrator receives his right entirely from the administration. (o) [*421]

But although an executor filing a bill before probate, must, as we have seen, allege in it that he has proved the will in the proper Ecclesiastical Court, it is not necessary that in a bill *against* an executor such a statement should be made; for if executors elect to act they are liable to be sued before probate, and cannot afterwards renounce. (p) It also seems that if a party entitled by law to take out administration to a deceased person, does not do so, but acts as if he

(g) Fowler v. Richards, 5 Russ. 39.
(h) Humphreys v. Ingledon, 1 P. Wms. 752.
(i) Humphreys v. Humphreys, 3 P. Wms. 349.
(k) Comber's Case, 1 P. Wms. 768.
(l) Fell v. Lutwidge, Barnard, 320; Humphreys v. Humphreys, 3 P. Wms. 350.
(m) 2 Sim. 241. (n) Comber's Case, 1 P. Wms. 768.
(o) Ibid.
(p) Blewitt v. Blewitt, 1 Younge, 543.

were administrator, and receives and disposes of the property, he will be liable to account as administrator, and it will not be necessary to have any other party before the Court. Thus, in *Cleland* v. *Cleland*, (*q*) an objection for want of parties, on the ground that an administrator was not before the Court, was overruled, because the widow of the deceased, who was the person by law entitled to the administration, and who had possessed herself of her husband's personal estate and disposed of it, was a party, though she denied by her answer that she had taken out administration, which, by the bill, she was alleged to have done.

Where it appears that, in order to complete the plaintiff's title to the subject of the suit or to the relief he seeks, some preliminary act is necessary to be done, the performance of such preliminary act ought to be averred upon the bill, and *the mere allegation that the title is complete, without such [*422] averment will not be sufficient; thus where a plaintiff claimed as a shareholder *by purchase*, of certain shares in a joint-stock company or association, alleging in his bill that he had purchased such shares for a valuable consideration, and had ever since held the same; but it appeared in another part of the bill, that, by the rules of the company or association, no transfer of shares could be valid in law or equity unless the purchaser was approved by a board of directors, and signed an instrument binding him to observe the regulations, the Lord Chancellor (Lord Brougham) allowed a demurrer, on the ground that the performance of the rule above pointed out was a condition precedent, and ought to have been averred upon the bill, and that the allegation of the plaintiff having purchased the shares and being a shareholder, although admitted by the demurrer, was not sufficient to cure the defect. (*r*)

The question, whether the assignees of a bankrupt or of an insolvent debtor can file a bill, without previously procuring the consent of the creditors, and averring that such consent had been obtained, has already been discussed at much length. All that need here be said upon that subject is, that it appears now to be settled that such an averment is not necessary. (*s*)

In pleadings at Common Law, it is held that, in stating a derivative title, a party claiming by inheritance, must show *how* he is heir, viz: as son or otherwise; and, if he claims by *mediate* and not *immediate* descent, he must show the pedigree; (*t*) for example, if he claims as nephew, he must show how he is nephew. It appears to be right, upon every principle, that the same rule should be observed in bills in equity; and, in *Lord Digby* v. *Meech*, (*u*) the Court of Exchequer appears to have acted upon this impression. In that case, the object of the bill was to establish the plaintiff's right to a manor, and to certain fines and fees, formerly granted, to the lord of it, by the King. The title, as set forth by the bill was, *that King James I. granted the [*423] premises to Sir John Digby, afterwards Earl of Bristol; from him they descended to George; from him to John, Earl of Bristol; *and, on his death, vested in the now plaintiff;* and it was objected at the hearing that there was not a sufficient title set forth, it not appearing *how* the premises vested in the plaintiff, whether by descent, settlement, or otherwise; and the whole Court agreed that the bill ought, for this reason, to be dismissed, the bill being to establish a right, as well as for an account: upon this ground the cause stood over, but with liberty for the plaintiff to amend his bill. The decision of Lord Thurlow in *Delorne* v. *Hollingsworth* (*x*) appears, however, to throw some

(*q*) Prec. Ch. 64.
(*r*) Walburn v. Ingilby, 1 M. & K. 61.
(*s*) *Vide ante*, p. 80, and Casborne v. Parsham, 6 Sim. 131.
(*t*) Steph. on Pleadings, 340.
(*u*) Bunb. 195.
(*x*) 1 Cox, 421.

doubt as to the necessity of setting out in a bill the manner in which the plaintiff makes out his descent. In that case the plaintiff who claimed to be entitled to certain premises as heir at law of an ancestor, and prayed a discovery of the defendant's title, and an account, &c., did not by the bill set out her pedigree fully, but stated that one person through whom she made title had three sons, and that she claimed, under the second son, without alleging that the first son died without issue; to this bill the defendant demurred, "because the plaintiff had not sufficiently stated the pedigree by which she made title," and the demurrer was over-ruled. In pronouncing his judgment, Lord Thurlow said, "If this demurrer were to be allowed, it would only drive the plaintiff to supply the pedigree in another bill, and thus I do not see the propriety of trying the main question, and cutting short the cause in this stage of it, unless a special case had been made out, by which it appeared that some great length of proceedings, or some great expense, would be saved by it. The whole question is, whether the allegation in the bill, of the plaintiff being heir, is not sufficient to entitle her to go on in the suit; and, in general, I see no reason why it should not." (y) It is, however, to be observed, that the plaintiff had in fact partly stated her pedigree; and that the defect arose from the circumstance of her omitting to state the death of a party without issue, whose death, under such circumstances, was necessary to entitle the *person, under whom the plaintiff claimed; but that the defect was supplied by the aver- [*424] ment that she claimed under that person, which she could not have done, if the other had not died without issue; so that, in fact, there was an averment, sufficient in substance, on the face of the bill, to obviate a demurrer on the ground taken, namely, that the pedigree was not sufficiently set out.

Where there is a privity existing between the plaintiff and defendant, independently of the plaintiff's title, which gives the plaintiff a right to maintain his suit, then it is not necessary to state the plaintiff's title fully in the bill; thus where a plaintiff's claim against the defendant arises under a deed or other instrument, executed by the defendant himself, or by those under whom he claims, which recites, or is necessarily founded upon, the existence, in the plaintiff, of the right which he asserts, it is sufficient to allege the execution of the deed by the parties. Thus in the case of a bill, by a mortgagor in fee, against a mortgagee, to redeem the mortgage, it is sufficient merely to state the mortgage-deed, without alleging that the mortgagor was seized in fee, &c., because the defendant having executed the deed which proceeds upon that supposition, amounts in effect to an acknowledgment of that fact, which he cannot afterwards be admitted to dispute; and so if the mortgagor has only a derivative title, it is not necessary to show the commencement of such derivative title, or its continuance, because the right of the plaintiff to redeem, as against the defendant, does not depend upon the title under which he claims, but upon the proviso for redemption in the mortgage-deed. Upon the same principle, where a defendant holds under a lease from the plaintiff, the plaintiff need not set out his title to the reversion, the fact of the defendant having accepted a lease from the plaintiff being sufficient to preclude his disputing the title under which he holds. (z) In like manner, where a man employs another as his bailiff or agent, to receive his rents or tithes, the right to call upon the bailiff or agent for an account does not depend upon the title *of the employer to the rents or tithes, but to the privity existing between him and his bailiff [*425] or agent; the employer may therefore maintain a bill for an account, without showing any title to the rents or tithes in question.

(y) Ibid.

(z) If the plaintiff claims as heir, or under a derivative title from the mortgagor or lessor, he must, as in other cases, show how he makes out his title.

Where, however, the plaintiff's right does not depend upon any particular privity between him and the defendant existing independently of his general title to the thing claimed, there it will be necessary to show his title in the bill. Thus, where a bill is filed by the lessee of a lay impropriator against an occupier, for an account of tithes, there the right of the plaintiff to the account depends solely upon his title; he must, therefore, deduce his title regularly, and show not only the existence of the lease, but that the person from whom it is derived had the fee. (*a*)

The same precision in showing an interest, which is required in setting out the case of a plaintiff, is not requisite in stating that of the defendant against whom the relief is sought, because a plaintiff cannot always be supposed to be cognizant of the nature of a defendant's interest, and the bill must frequently proceed with a view to obtain a discovery of it; thus, where a bill was filed, by a lessee for years, for a partition, and the plaintiff, after stating his own right, to one undivided tenth part, with precision, alleged that the defendant was seized in fee simple of, *or otherwise well entitled to*, seven other tenth parts, a demurrer, on the ground that the plaintiff had not set out the defendant's title with sufficient certainty, was over-ruled. (*b*) And even where it is evident, from the nature of the case, that a plaintiff must be cognizant of the defendant's title, and sets out the same informally, yet, if he alleges enough to show that the defendant has an interest, it will be sufficient. Thus, where a bill was filed to redeem a mortgage, but the conveyance was so stated that it did not show that any legal estate had passed to the defendant, a demurrer, was over-ruled because the defendant could not be permitted to dispute his own title, which was admitted by the plaintiff to be good. (*c*)

[*426] *In all cases, however, a bill must show that a defendant is in some way liable to the plaintiff's demand, (*d*) or that he has some interest in the subject of the suit, (*e*) otherwise it will be liable to demurrer. Thus, where a bill was brought upon a ground of equity, by the obligee, in a bond against the heir of the obligor, alleging that the heir having assets by descent ought to satisfy the bond, a demurrer was allowed, because the bill did not expressly charge that the heir was bound in the bond, although it did state that the heir ought to pay the debt; (*f*) so where a bill was brought against an assignee touching a breach of covenant in a lease, and the covenant, as stated in the bill, appeared to be collateral, and not running with the land did not, therefore, bind assignees, and was not stated by the bill expressly to bind assignees, a demurrer by the assignee was allowed. (*g*) And here it may be observed that, although it is generally necessary to show that the plaintiff has some claim against a defendant, or that a defendant has an interest in the subject-matter in litigation, yet there are cases in which a bill may be sustained against defendants who have no interest in the subject, and who are not in any manner liable to the demands of the plaintiff. The cases alluded to are those, which have been before referred to, of the members or officers of a corporation aggregate, who, as we have seen, may be made parties to a suit against the corporation for the purposes of discovery. With respect to the other persons who are generally included amongst the exceptions to the rule, that no persons who have not an interest, or against whom a decree cannot be pronounced can be made parties to a suit, (such as arbitrators, attorneys or agents,) it will be

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(*a*) Penny v. Hoper, Bunb. 115; *vide* Burwell v. Coates, ibid. 129.
(*b*) Baring v. Nash, 1 V. & B. 551.
(*c*) Roberts v. Clayton, 3 Anst. 715.
(*d*) Lord Red. 132.
(*e*) Ibid. 130.
(*f*) Crosseing v. Honor, 1 Vern. 180.
(*g*) Lord Uxbridge v. Staveland, 1 Ves. 56, 394.

seen, upon reference to what has been before stated upon this subject, (*h*) that the right to make them parties is confined to cases where relief is, in fact, prayed against them, viz: where they are implicated in fraud or collusion, and it is specifically asked that they may pay the costs; or where they are the holders of a particular instrument which the plaintiff is entitled to have delivered up. (*i*)

*A bill must not only show that the defendant is liable to the plaintiff's demands, or has some interest in the subject-matter, but [*427] it must also show that there is such a privity between him and the plaintiff as gives the plaintiff a right to sue him; (*k*) for it is frequently the case that a plaintiff has an interest in the subject-matter of the suit which may be in the hands of a defendant, and yet, for want of a proper privity between them, the plaintiff may not be the person entitled to call upon the defendant to answer his demand. Thus, though an unsatisfied legatee has an interest in the estate of his testator, and a right to have it applied in a due course of administration, yet he has no right to institute a suit against the debtors to his testator's estate for the purpose of compelling them to pay their debts in satisfaction of his legacy. (*l*) For there is no privity between the legatee and the debtors, who are answerable only to the personal representative of the testator. Upon the same principle, where a bill was filed by the creditors of a person who was one of the residuary legatees of a testator against the personal representative for an account of his personal estate, it was held to be impossible to maintain such a bill. (*m*) And so where a creditor of a testator, who had previously been a bankrupt, and had obtained his certificate, brought a bill against the executor for an account, &c., and made the assignees under the testator's bankruptcy parties for the purpose of compelling them to account to the executor for the surplus of the bankrupt's estate, a demurrer by the assignees was allowed. (*n*)

It is to be observed, however, that, in cases of collusion between the debtor and the executor, or of the insolvency of the executor, bills by creditors or residuary legatees against debtors to a testator's estate will be entertained; (*o*) and it seems also that where other persons than the personal representative of the testator have possessed *specific assets* of the *testator, such [*428] persons may be made parties to a suit by a creditor. (*p*) So also, where it is desirable to have the account of the personal estate entire, a creditor may make the surviving partner of a deceased debtor a defendant to his bill, though no fraud or collusion is alleged. (*q*) And it seems that a joint creditor may maintain a suit against the representatives of a deceased partner for satisfaction of his entire demand out of the assets, although the surviving partner is not alleged to be insolvent and is made a party to the bill. (*r*) In *Bowsher* v. *Watkins*, (*s*) it was determined that residuary legatees may sustain a bill for an account against the executor and surviving partners of the testator, though collusion between the executor and the surviving partners is neither charged nor proved. Upon the same principle, it was held, in *Holland* v. *Prior*, (*t*) that,

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(*h*) *Ante*, p. 394.
(*i*) *Vide ante* 396.
(*k*) Lord Red. 129.
(*l*) Bickley v. Doddington, Lord Red. 129, n.; Monk v. Pomfret, ib.
(*m*) Elmslie v. M'Aulay, 3 Bro. 624.
(*n*) Utterson v. Mair, 4 Bro. C. C. 270, S. C. 2 Ves. J. 95; Beckley v. Dorrington, cited 6 Ves. 749.
(*o*) Ibid.; *vide etiam* Doran v. Simpson, 4 Ves. 651; Alsager v. Rowley, 6 Ves. 749; Troughton v. Binkes, 6 Ves. 573–575; Benfield v. Solomons, 9 Ves. 86.
(*p*) Newland v. Champion, 1 Ves. 106.
(*q*) Ibid.; *Vide etiam* Gedg v. Traill, 1 Russ. & M. 281 n.
(*r*) Wilkinson v. Henderson, 1 M. & K. 582.
(*s*) 1 Russ. & M. 277.
(*t*) 1 M. & K. 237.

in a suit for an account of the assets of a deceased person, the personal representative of a former representative was properly joined as a co-defendant with his continuing or present personal representative.

In all these cases, however, it is absolutely necessary that the actual personal representative should be before the Court, otherwise the bill cannot be sustained. (*u*)

It seems that where it is necessary to allege fraud or collusion in cases of this nature, a general allegation of it in the bill will be sufficient to shut out a demurrer, although, in the opinion of Lord Eldon, it would be very convenient to state the facts upon which such allegation is founded, as there is great inconvenience in joining issue upon such a general charge without giving the defendant a hint of any fact from which it is to be inferred. (*x*)

With reference to the subject of privity between the plaintiff and defendant, it is to be observed that the employment of agents or brokers in a transaction does not interfere with the privity between the principals so as to deprive them [*429] of their right to sue each other, immediately. Thus, where a principal *transmits goods to a factor, he may sue the party who buys of that factor; and where a bill was brought by some merchants against the defendant to discover what quantity of straw he had purchased of their agents, and for payment to them and not to the agents, a demurrer was overruled; (*y*) and so where a merchant, acting upon a *del credere* commission, became bankrupt, having sold goods of his principals for which he had not paid them, and, shortly before his bankruptcy, drew bills on the vendees, which he delivered to some of his own creditors in discharge of their demands, they knowing his insolvency, a suit by the principals against the person who had received the bills for an account and payment of the produce was sustained. (*z*)

A bill must not only show that the plaintiff is entitled to or interested in the subject matter of the litigation, and is clothed with such a character as entitles him to maintain the suit, and that the defendant is also liable to the relief sought against him, or is in some manner interested in the dispute, and that there is such a privity between him and the plaintiff as gives the plaintiff a title to sue him, but it must also pray the Court to grant the proper relief suited to the case, as made by the bill; and if, for any reason founded on the substance of the case as stated in the bill, the plaintiff is not entitled to the relief he prays, either in he whole or in part, the defendant may demur. (*a*) In some of the most ancient bills, as appears by the records in the Tower, the complainant does not expressly ask any relief nor any process, but prays the Chancellor to send for the defendant and to examine him. In others, where relief is prayed, the prayer of process is various, sometimes a *corpus cum causâ*, sometimes a *subpœna*, and sometimes other writs. (*b*) Afterwards the bill appears to have assumed a more regular form, and not only to have prayed the *subpœna* of the Court, but also suitable relief adapted to the case contained in the statement, which is the gen- [*430] eral form of all bills in modern use. But although it is *the general practice of the present day, in all cases where relief is sought, to specify particularly the nature of such relief; yet it seems that such special prayer is not absolutely necessary, and that praying general relief is sufficient; (*d*) and, in *Partridge* v. *Haycraft*, (*e*) Lord Eldon said that he had seen a bill with

(*u*) *Vide ante*, p. 293, 340.
(*v*) Benfield v. Solomons, 9 Ves. 87.
(*y*) Lisset v. Reave, 2 Atk. 394.
(*z*) Newman v. Godfrey, cited Lord Red. 130, 2 Bro. C. C. 332, S. C.
(*a*) Lord Red. 133.
(*b*) Jud. Auth. M. R. 91, 92.
(*d*) Cook v. Martyn, 2 Atk. 3; Grimes v. French, ib. 141.
(*e*) 11 Ves. 570–574.

a simple prayer that the defendant might answer all the matters aforesaid, and then the general prayer for relief.

It is to be observed, that, where specific relief is prayed, care must be taken to adapt such relief to the case made by the bill, as, after praying specific relief, a plaintiff cannot, at the hearing, dissent to the relief he has sought, and, under the general prayer, ask relief of another description, unless the facts and circumstances charged by the bill, will, consistently with the rules of the Court, maintain that relief. (*f*)

The requisites above set out are necessary in every bill which is filed in a court of equity for the purpose of obtaining relief; there are other requisites appertaining to bills adapted to particular purposes, which will be hereafter pointed out, as well as those distinctive properties which belong to bills not filed for the purposes of relief. But besides those points which are generally necessary to be attended to in the frame of all bills, as each case must depend upon its own particular circumstances, matters must be introduced into every bill which will occasion it to differ from others, but which it is impossible to reduce under any general rules, and must be left to the discretion of the draftsman. Care, however, must be taken in framing the bill that everything which is intended to be proved be stated upon the face of it, otherwise evidence cannot be admitted to prove it. (*g*) This is required in order that the defendant may be aware of what the nature of the case, to be made against him, is. The necessity of observing this rule was strongly insisted on by Sir R. Richards, L. C. B., in the case of *Hall* v. *Maltby*. (*h*) And in *Montesquieu* v. *Sandys*, (*i*) *the principle upon which it is founded is strongly illustrated. In that case a bill was filed to set aside a contract entered [*431] into by an attorney for the purchase of a reversionary interest from his client, on the ground of fraud and misrepresentation; the evidence adduced in support of the allegation of fraud, &c., did not, in Lord Eldon's opinion, substantiate the case as laid in the bill; a transaction however was disclosed in the evidence which his Lordship appeared to think would have raised a question of considerable importance in favour of the plaintiff if it had been properly represented upon the pleadings; but as it had not been stated in the bill, he thought it would be far too much to give relief upon circumstances which were alleged upon the record.

It is to be observed in this place that not only will it be impossible to introduce evidence as to facts which are not put in issue by the bill, but that even an inquiry will not be directed before the Master unless ground for such inquiry is laid in the pleadings. (*k*) Thus, where a bill was filed for a foreclosure, and a motion was made for a reference to the Master, under the 7th Geo. 2, c. 20, to inquire into the amount due upon the mortgage, and it was insisted that the Master ought to be directed to take an account of the costs incurred by the plaintiff in certain proceedings in an ejectment at law which were not alluded to in the bill, the Court held that no such inquiry could be directed, but gave the plaintiff leave to amend his bill in that respect. (*l*)

It is right here to observe that, independently of the qualities which have been above pointed out as necessary to bills in general, it is requisite that the

(*f*) Per Lord Eldon in Hiern v. Mill, 13 Ves. 144–119, and Soden v. Soden, cited ib. 119; *vide post*, sect. 5.

(*g*) Gordon v. Gordon, 3 Swan, 472. (*h*) 6 Price, 240–259.

(*i*) 18 Ves. 302; *vide etiam* Powys v. Mansfield, 6 Sim. 565.

(*k*) Hollyway v. Millard, 1 Mad. 414. (*l*) Millard v. Magor, 3 Mad. 433.

object for which a bill is brought should not be beneath the dignity of the Court; for the Court of Chancery will not entertain a suit where the subject matter of the litigation is under the value of 10*l.*; except in cases of charities, (*m*) or of fraud, (*n*) or of bills to establish a right, as in the case of 6*s.* claimed to be due as an Easter offering. (*o*) It is said *that the Court will not entertain a bill for land under the yearly value of 40*s.*; (*p*) but instances occur in the books where bills have been entertained for the recovery of ancient quit rents, though very small, viz: 2*s.* or 3*s.* per annum. (*q*) It seems that if a bill is brought for a demand which, by the rule of the Court, cannot be sued for, the defendant may either demur to it, on the ground that the plaintiff's demand, if true, is not sufficient for the Court to ground a decree upon, (*r*) or he may (which is the most usual course) move to have the bill dismissed, as below the dignity of the Court. (*s*) But even if the defendant should take neither of these courses, yet, when the cause comes to a hearing, if it appears that, on an account taken, the balance due to the plaintiff will not amount to the sum of 10*l.*, the Court will dismiss the bill. (*t*) Thus, in the time of Lord Harcourt, upon a bill being brought relating to tithes, it was clearly admitted that the plaintiff had a right to some tithes of the defendant, but as the tithes which were due appeared to be only of the value of 5*l.*, the Lord Chancellor dismissed that bill at the hearing; (*u*) and in *Brace* v. *Taylor*, where an objection was taken, at the hearing, that the matter in question appeared to be of small and trifling consequence, Lord Hardwicke held that though the defendant had not demurred to the bill on that account, yet the objection might be taken advantage of at the hearing; "for it very often happens that a bill may be drawn in such a manner as to prevent a demurrer of this sort, especially in a matter relating to an account; and therefore it would be very unreasonable that an objection of this sort might not be taken at the hearing." (*w*)

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A bill must not only be for a subject which it is consistent with the dignity of the Court to entertain, but it must also be brought for the whole subject. The Court will not permit a bill to be brought for part of a matter only, (*x*) so as to expose a defendant to be harrassed by repeated litigations concerning the same thing; it therefore requires that every bill shall be so framed as to afford ground for such a decision upon the whole matter, at one and the same time, as may, as far as possible, prevent future litigation concerning it. It is upon this principle that the Court acts, in requiring in every case the presence, either as plaintiffs or defendants, of all parties interested in the object of the suit. And upon the same principle, it will not allow a plaintiff who has two distinct claims upon the same defendant, or to which the same defendant may eventually prove liable, to bring separate bills for each particular claim, or to bring a bill for one and omit the other, so as to leave the other to be the subject of future litigation. Thus in *Purefoy* v. *Purefoy*, (*z*) where an heir, by his bill, prayed an account against a trustee of two several estates, that were conveyed to him for several and distinct debts, and afterwards would have had his bill dismissed as to one of the estates, and have had the account taken as to the other only, the Court decided that an entire account

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(*m*) Anon, 1 Eq. Ca. Ab. 75, Margin.
(*o*) 4 Bro. P. C. 314.
(*q*) Cocks v. Foley, 1 Vern. 360.
(*s*) Ros. 47, 356.
(*u*) Cited in Brace v. Taylor, *infra*.
(*x*) Lord Red. 14.
(*n*) Bunb. 17.
(*p*) Eq. Ca. Ab. 75.
(*r*) Fox v. Frost, Rep. T. Finch, 253.
(*t*) Cowp. Eq. Pl. 166.
(*w*) 2 Atk. 253.
(*z*) 1 Vern. 29.

should be taken of both estates, "for that it is allowed as a good cause of demurrer in this Court, that a bill is brought for a part of a matter only, which is proper for one entire account, because the plaintiff shall not split causes and make a multiplicity of suits." And so where there are two mortgages, and more money has been lent upon one of them than the estate is worth, the heir of the mortgagee cannot elect to redeem one and leave the heavier mortgage unredeemed, but shall be compelled to take both. (a) Upon the same principle it is held, that "where there is a debt secured by mortgage, and also a bond debt, when the heir of the mortgagor comes to redeem, he shall not redeem the mortgage without paying the bond debt too, in case the heir be bound." (b) The ground of this rule is the prevention of circuity of remedy; for as the bond of the ancestor, where the heir is bound, becomes, upon the death of such ancestor, the heir's own debt, and is payable out of the real estate descended, it is but reasonable that where the heir comes to redeem the estate by payment of the *principal money and interest, he should at the same time be called upon to pay off the bond, as otherwise the obligee would [*434] be driven to sue him for the recovery of the bond, which in the result might be payable out of the same property which the heir has redeemed.

When it is laid down as a rule that the Court will not entertain a suit for part of a matter, it must be understood as subject to this limitation, viz: that the whole matter is capable of being immediately disposed of; for if the situation of the property in dispute is such, that no immediate decision upon the whole matter can be come to, the Court will frequently lend its assistance to the extent which the actual state of the case, as it exists at the time of filing the bill, will warrant. Upon this principle courts of equity act, in permitting bills for the preservation of evidence in *perpetuam rei memoriam*, which it does upon the ground that, from the circumstances of the parties, the case cannot be immediately the subject of judicial investigation; and if it should appear upon the bill that the matter to which the required testimony is alleged to relate can be immediately decided upon, and that the witnesses are resident in England, a demurrer would hold. (c) It is upon the same principle that the Court proceeds in all that class of cases in which it acts as ancillary to the jurisdiction of other courts, by permitting suits for the preservation of property pending a litigation in the Ecclesiastical or Common Law Courts, or by removing the impediments to a fair litigation before tribunals of ordinary jurisdiction. In all these cases it is no ground of objection to a bill that it embraces only part of the matter, and that the residue is or may be the subject of litigation elsewhere. The preservation of the property, or the removal of the impediments, is all that the Court of Equity can effect; the bill, therefore, in seeking that description of relief, seeks the whole relief which, in such cases, a Court of Equity can give; but if a bill, praying only this description of relief, should disclose a case in which a Court of Equity is capable of taking upon itself the whole decision of the question, in such a case, it is apprehended, that the bill *would be defective in not seeking the relief which the plaintiff is [*435] entitled to.

With reference to this part of the subject may be noticed the much litigated question, whether a person engaged in trade in co-partnership with others, can or cannot maintain a bill against his partners for an account, without praying also a dissolution of the partnership; upon this point the decisions are very conflicting, and all that can be done at present is to direct the reader's attention to

(a) Ibid. Margrave v. Le Hooke, 2 Vern. 207.
(b) Shuttleworth v. Laycock, 1 Vern. 245; *Anon*, 2 Ch. Ca. 164.
(c) Lord Red. 121.

the leading cases in favour of each proposition. In *Forman* v. *Homfray*, (*d*) Lord Eldon said he did not recollect an instance of a bill filed by one partner against another, praying an account merely and not a dissolution, proceeding on the foundation that the partnership was to continue; and observed upon the inconvenience that would result if a partner could come here for an account merely, pending the partnership, as there seemed to be nothing to prevent his coming annually. (*e*) In *Marshall* v. *Colman*, (*f*) an injunction was applied for to restrain the breach of a covenant contained in articles of partnership, by which all contracts, &c., to be made by the partners were to be in the name of the partnership firm; and Lord Eldon refused the application, because he considered that the acts complained of on the part of the plaintiff, as the ground for the injunction, were of too trivial a nature to warrant a dissolution of the partnership. Upon that occasion his Lordship said, that although the Court would interfere where there was a breach of the covenants in articles of co-partnership, so important in its consequences, as to authorize the party complaining to call for a dissolution of the co-partnership, it was a matter deserving great consideration *whether the Court would go so far as to entertain the jurisdiction of pronouncing a decree for a perpetual injunction as to a particular covenant, the partnership not being dissolved by the Court. In *Kinder* v. *Taylor*, (*g*) the doctrine that a decree could not be made for an account in matters of partnership, without praying a dissolution, appears to have been again recognized; and, in *Loscomb* v. *Russell*, (*h*) the Vice Chancellor (Sir L. Shadwell) allowed a demurrer to a bill praying the account of a partnership, because it did not pray for a dissolution. In *Harrison* v. *Armitage*, (*i*) however, a contrary opinion was expressed by Sir John Leach, V. C.; and in *Richards* v. *Davis*, (*j*) which was a bill by one partner against another, praying for an account of what was due to the plaintiff respecting past partnership transactions, and that the partnership might be carried on under the decree of the Court, his Honor decreed an account of past partnership transactions, but said that he could make no order for carrying on the partnership concerns, unless with a view to a dissolution. In pronouncing his judgment upon that case, the learned Judge observed, that a partner during the partnership has no relief at law for moneys due to him on a partnership account; and that, if a Court of Equity refuses him relief, he is wholly without remedy, which would be contrary to the plain principles of justice, and cannot be the doctrine of equity. With respect to the objection that the defendant might be vexed by a new bill, whenever new profits accrued, his Honor said, "What right has the defendant to complain of such new bill, if he repeats the injustice of withholding what is due to the plaintiff? Would not the same objection lie in a suit for tithes which accrue *de anno in annum?*"

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(*d*) 2 Ves. & B. 329.

(*e*) It is said by one of the learned reporters, in a note, that, in the case of theatres, the Court has refused to take jurisdiction upon any other principle than a dissolution of partnership; Waters v. Taylor, 15 Ves. 10. But it is to be observed that theatres are property of a very peculiar description, and that any interference with the management of them by the Court might be productive of irreparable damage and ruin to the parties concerned, and that it is upon this principle that, in Waters v. Taylor, the Court hesitated to interfere during the existence of the partnership. It was said by the Solicitor General, *arguendo* in Loscombe v. Russell, that it appeared from the brief in Forman v. Homfray, that the plaintiff there prayed for an account which was to be continued until the end of the term of the partnership, 4 Sim. 8.

(*f*) 2 J. & W. 267.

(*g*) Gow on Partnerships; Collyer on Partnerships; App. 11.

(*h*) 4 Sim. 8.

(*i*) 4 Mad. 143, cited in Loscombe v. Russell, *ubi supra*.

(*j*) 2 Russ. & M. 349.

It is to be observed that in the last quoted case of *Richards* v. *Davis*, the case of *Clapple* v. *Cadell* (*k*) was cited in argument, and is referred to by the reporter as an authority for the position that a decree may be made for partnership accounts without the bill having prayed a dissolution; but, upon reference to the *case itself, it will be found that it was one of a very peculiar nature, and that the principal object of the suit was not an account of the partnership transactions, but to have a declaration as to the effect of a sale of some shares in a partnership undertaking; (the *Globe* newspaper) and that the account of the profits which was decreed was merely the consequence of the declaration of the Court upon that point. The same observation applies to *Knowles* v. *Houghton*, (*l*) which is also referred to in *Richards* v. *Davis*. (*m*) There the bill was filed to establish a partnership in certain transactions; and the sole question in the case was, partnership or no partnership; and the Court, being of opinion that a partnership did exist in part of the transactions referred to, as a necessary consequence decreed an account of these transactions. [*437]

In endeavouring to avoid the error of making a bill not sufficiently extensive to answer the purpose of complete justice, care must be taken not to run into the opposite defect, viz: that of attempting to embrace in it too many objects, for it is a rule in equity that two or more distinct subjects cannot be embraced in the same suit. The offence against this rule is termed *multifariousness*, and will render a bill liable to a demurrer.

The rule above stated is fully established, and has been acted upon in a great variety of cases. Thus where a bill was filed in the Exchequer against one defendant to discover his title to the office of keeper of Gloucester Castle, which had been granted to the plaintiff for life, and also against other defendants as brewers of the city of Gloucester; every one of whom, as the bill suggested, was by custom obliged to pay an annual sum to the said officer, a demurrer to the bill, on the ground of multifariousness, was allowed. (*n*) Upon the same principle, where a bill was exhibited by the trustees under a trust for sale, against several persons who were the purchasers of the trust estates, which had been sold to them by auction in different lots, Sir Thomas Plumer, V. C., allowed *a demurrer, which had been put in by one of the defendants, on the ground that the bill was multifarious. His Honor said, this Court is always averse to a multiplicity of suits, but certainly a defendant has a right to insist that he is not bound to answer a bill containing several distinct and separate matters relating to individuals with whom he has no concern. (*m*) In a subsequent case, where an information and bill was filed for the purpose of setting aside leases, granted by the same trustees at different times to different persons, the same learned judge held, that if the case had been free from other objections it would have been objectionable for multifariousness. (*n*) The same principle was afterwards acted upon by Lord Eldon, in *Salvidge* v. *Hyde*, (*o*) where a bill had been filed for an account of a testator's estate, and also to set aside certain sales which had been made by the executor and trustee to himself and another person of the name of Laying, a demurrer to which bill had been put in by Laying, was over-ruled by Sir J. Leach, V. C. (*p*) The case came on before the Lord Chancellor, by appeal, when his Lordship reversed the judgment of the Vice Chancellor, and allowed the demurrer; observing that where there are trustees to sell, and a bill is filed against them, it is not [*438]

(*k*) Jac. 537.
(*l*) 11 Ves. 168.
(*m*) *Ubi supra.*
(*n*) Berke v. Harris, Hard. 337.
(*m*) Brookes v. Lord Whitworth, 1 Mad. 89; *vide etiam*; Reyner v. Julian, 2 Dick. 677, the marginal note to which is wrong.
(*n*) Attorney General v. Moses, 2 Mad. 294—305.
(*o*) Jac. 151.
(*p*) 5 Mad. 138, S. C.

usual to make the purchasers parties, but to state the contracts and pray an inquiry. His Lordship however added, that there might be cases which cannot be delayed, till those inquiries can be made, on account of the injury that may be done in the meantime.

It is to be remarked that the Vice Chancellor (Sir John Leach) in pronouncing his judgment upon this demurrer, observed, with reference to multifariousness, that "in order to determine whether a suit is multifarious, or in other words contains distinct matters, the inquiry is not whether each defendant is connected with every branch of the cause, but whether the plaintiff's bill seeks relief in respect of matters which are in their nature separate and distinct. If, says his [*439] Honor, the *object of the suit be single, but it happens that different persons have separate interests, in distinct questions, which arise out of that single object, it necessarily follows that such different persons must be brought before the Court in order that the suit may conclude the whole subject." There is no doubt that, in the above observation, the learned judge stated the principle correctly; though in his application of it he went, in the opinion of Lord Eldon, too far. In the subsequent case of *Turner* v. *Robinson*, (q) Sir J. Leach, carried the doctrine which he had above laid down to a much greater extent. In that case, a testator had bequeathed the residue of his personal estate to trustees in trust, to divide the same amongst his children, the shares of the sons to be paid to them at 21, and the shares of the daughters to be laid out in government securities, the interest of which was to be paid to their separate use during their lives, and after their deaths the principal of each daughter's share was to be paid to such persons as such daughter should by any deed or writing, duly executed, or by her last will and testament appoint. The testator left ten children, and one of those children, a daughter, died, having by her will appointed and disposed of all her interest under the testator's will, in favour of the plaintiffs, to whom she also gave the residue of her own personal estate. The bill was filed by the plaintiffs against the personal representatives both of the father and of the daughter, and also against the surviving children of the father, and prayed that the trusts of both wills might be carried into execution, and an account of each estate against the respective executors: to this bill a demurrer for multifariousness was put in by one of the surviving children of the father, who insisted that, although the plaintiffs, as appointees of their mother's share under the will of the original testator, were entitled to file a bill against the personal representatives of the testator and the other parties interested in the residue of his estate, yet that, in going on to pray an account of the daughter's estate the bill had been rendered multifarious, because the defendants who were interested in the father's estate only, ought not to be kept before [*440] the Court, whilst the accounts of *the daughter's estate were being taken; the Vice Chancellor, however, held that as the plaintiffs title to their shares of the original testator's estate, and to their mother's estate, were derived under the same instrument, they were entitled to unite the accounts of both estates in the same suit, and that therefore the bill was not multifarious.

It is with great diffidence that the writer presumes to advance an opinion in opposition to that of so great an authority as the learned judge referred to, but he cannot avoid observing here, that the reason given by his Honor for the above decision does not appear to him sufficient to warrant the conclusion to which he came; for, though it is certainly true that in many cases the circumstance of the claims of a plaintiff arising under one instrument may justify his instituting a suit for the purpose of carrying all the objects of that instrument into execution, as in the common case of bills to carry the trusts of a will into effect, yet

(q) 1 S. & S. 313.

that circumstance will not authorize his bringing into the same suit all persons against whom he may casually have a claim under the same instrument, however distinct in other respects such claim may be. Thus, in the case of *Salvidge* v. *Hyde*, before referred to, the object of the bill was the single one of executing the trusts of the will; and it was contended that the defendant the purchaser having entered into a contract under circumstances amounting, according to the case made by the bill, to a fraud, was to be considered as a trustee for the plaintiffs, and that they had a right to have all the trusts performed in one suit; but Lord Eldon held otherwise, and said that if an executor having a power to sell agrees to sell to A. B., a bill cannot be filed against A. B., and also against the executor for an administration of the estate; and yet in that case the claim of the plaintiff for each species of relief arises under the same instrument. And so in *Turner* v. *Robinson*, now under consideration; it is true that the claim of the plaintiffs to both descriptions of relief, arose under the same instrument, but, as in *Salvidge* v. *Hyde*, the relief sought against one set of defendants was totally different from that sought against the others; and in fact there was no privity between the cases beyond that which was derived from the *mere circumstance of the claim of the plaintiff against each party being founded upon the same will, which in fact operated differently [*441] upon the different estates, namely, in the case of one estate by appointment, and in that of the other by testamentary disposition.

It may be observed here, that the above observations upon the opinion of Sir John Leach, in *Turner* v. *Robinson*, appear to be in accordance with the opinion of the present Vice Chancellor; (Sir L. Shadwell) who, upon *Turner* v. *Robinson* being cited before him, upon the argument of a demurrer for multifariousness, said that he could not coincide with the decision in that case, as he could not see how a person interested in the personal estate of two testators could, consistently with the rules of the Court, unite the two estates in the same suit. (r)

But although you cannot, in general, join the administration of the estates of two different persons in the same suit, where the parties interested in such estates are different, yet where the same parties claim the benefit of both estates, and they are so connected that the account of one cannot be taken without the other, the joinder of them in the same suit will not be multifarious; thus, where A. died intestate, leaving infant children and a widow, who, without taking out administration to the intestate, possessed his assets and died, having bequeathed her personal estate to the children, and appointed B. and C. her executors; upon which D. having taken out administration to the original intestate, brought an action against B. and C. as executors of the widow, to recover what she had received of the intestate's estate; whereupon B. and C., together with the children, filed a bill against D. to restrain the action, and to have proper accounts taken of the assets both of the intestate, and of the widow, a demurrer for multifariousness, put in by D. because it prayed an account of both estates, in one of which only, (that of the intestate) the defendant was interested, was overruled; the Vice Chancellor observing that the executors of the mother had a right to have an account taken of the estate which they represented, and that the *infant plaintiffs had a right to file a bill against D., [*442] who was their trustee, for the purpose of restraining him from proceeding in the action to the fruits of which it was alleged that they alone were entitled; and that D., by bringing actions, had implicated himself with the estate of the mother, so that the Court could not administer relief with reference to that action, unless the account of the mother's estate was taken. (s)

(r) Marcos v. Pebrer, 2 Sim. 330, n., *vide etiam*, Dunn v. Dunn, ibid 329.
(s) Lewis v. Edmund, 6 Sim. 251.

In the case of *Salvidge* v. *Hyde*, above referred to, a distinction was pointed out by Lord Eldon, which is important in the consideration of this subject. It will be recollected that it was a bill, by persons interested under a will, to set aside two contracts, one of which had been entered into by the trustees for sale of an estate to one of their own number, and the other for the sale of another estate to a person of the name of *Laying*; and Lord Eldon, although he thought that the object of setting aside the contract entered into with *Laying* could not be embraced in a bill to set aside the contract entered into with the trustee, yet held that if the trustee had purchased for himself, and then *Laying* had bought the same estate of him, the case would have been different. From this it may be deduced, that the objection to making separate contracts for different things entered into by separate parties, the subject of the same suit does not apply to making persons claiming under sub-contracts parties to the same bill, either to enforce or set aside the original contract.

It should be noticed here, that where the right of a party to call upon the Court for specific relief against another is so incumbered that he cannot assert his own right till he has got rid of that incumbrance, he cannot include the object of getting rid of the incumbrance, in a suit for the specific relief which, but for that incumbrance, he would be entitled to; and that, if he attempt to do so by the same suit, his bill will be multifarious. Thus it was held by Lord Eldon that, when a bill is filed for a specific performance, it should not be [*443] mixed up with a prayer for relief against other persons *claiming an interest in the estate; and that if there is a title in other persons which the plaintiff is bound to get in, he should file a bill for specific performance only, and should fortify the defect in his title, by such means as he can, so as to be enabled to complete it by the time when the contract will be enforced. (*t*) The same doctrine was also acted upon by Lord Redesdale, in *Whaley* v. *Dawson*, (*u*) the facts of which case were these:—A bill was first filed against the Dawsons for a partition, and in their answers to that bill they insisted that there had already been a parol partition; in evidence of which they stated, among other circumstances, that a lease had been made by the plaintiff, to a person of the name of *Carraher*, of the part which had been allotted to him; that this lease was made at an under-value, whereby the value of the whole estate would be injured if there should be a new partition; and, therefore, they insisted that there could be no new partition as long as the lease subsisted. In consequence of this statement the plaintiff amended his bill by making the lessee, *Carraher*, a defendant, and praying that the lease might be set aside for fraud; whereupon the original defendants demurred to the amended bill for multifariousness, and Lord Redesdale allowed the demurrer, saying that the plaintiff ought to have filed his bill against *Carraher* only, and got rid of his lease, and that then he might have filed a bill for a partition; "this is the very case which the rule of the Court is intended to avoid, the Dawsons are not to be involved in the litigation of the question, whether this lease is to be set aside or not. There may be collateral issues upon it, and after all Mr. Whaley may not be able to get rid of the lease, and, if he cannot, he can have no new partition."

The principle which renders it improper to mix up, in the same bill, demands against different persons arising out of distinct transactions, renders it improper to include in one suit separate infringements of the same patent, by different defendants; (*v*) and for the same reason, where a copyright has been infringed, [*444] bills must be filed against each bookseller *taking spurious copies for sale. (*x*) And so joint and separate demands cannot be joined

(*t*) Mole v. Smith, Jac. 494.
(*u*) 2 Sch. & Lef. 367.
(*v*) Dilly v. Doig, 2 Ves. Jun. 486.
(*x*) Dilly v. Doig, 2 Ves. Jun. 486.

in a bill: (y) and, although where a man carries on three businesses he may be sued for an account in every one of them jointly, yet, if he is a sole trader in one business, and has a partner in a second, and two partners in a third, a plaintiff cannot join his demands against the three houses in one bill. This was stated, in the course of the argument, in *Ward* v. *The Duke of Northumberland*, (a) in which the question of multifariousness, in mixing joint and separate demands in one bill, was very fully discussed. In that case, the plaintiff was tenant to the preceding Duke of Northumberland, and the defendants, the existing Duke and Lord Beverley, were his executors, and the bill was filed against them, as such executors, for an account of dealings between the plaintiff and the deceased Duke, and for satisfaction of the plaintiff's demands out of his assets; the bills also prayed an account against the existing Duke, as the heir-at-law of the late Duke, of dealings between him and the plaintiff since the death of the late Duke. To this bill the two defendants put in separate demurrers; that of the Duke was in these words: "For that the complainants, in and by the said bill of complaint, have made a demand against both the defendants jointly, as executors of the late most noble Hugh Duke of Northumberland, and have also thereby sought relief against this defendant, Hugh Duke of Northumberland personally upon a separate and distinct claim, to which, as executor of the late Duke of Northumberland, if at all, he is not liable; wherefore," &c. Lord Beverley's demurrer was as follows: "For that the said bill contains in itself parties which have no relation to, or dependance upon, each other, whereby the said bill is drawn to unnecessary length; and this defendant, if he should be compelled to make answer thereto, will be put to unnecessary expenses, contrary to the constant practice of this honourable Court; wherefore," &c. Both these demurrers came on for argument together, and were allowed. In pronouncing the judgment of the *Court, Sir A. Macdonald, L. C. B. said, "Lord Beverley very justly [*445] objects to being joined in a suit, a considerable part of which relates merely to the private concerns of the present Duke and has no connection with the estate of their testator. As to the demurrer of the Duke, he is indeed interested in every part of the bill, but in different characters: in the one, he can only be sued jointly with his co-executor; in the other, he is perfectly distinct from him. The two demands against the Duke are indeed of a similar nature, but perfectly distinct and unconnected; as one of the executors of his father he has a right to object to that estate being implicated in a litigation concerning his own affairs."

It is to be observed that the objection on account of multifariousness will only apply where a plaintiff claims several matters of different natures by the same bill; and that where one general right only is claimed by the bill, though the defendants have separate and distinct interests, a demurrer will not hold. (b) As where a person claiming a general right to the sole fishery of a river, files a bill against a number of persons claiming several rights in the fishery, as lords of manors, occupiers of lands or otherwise; (c) so, in a bill for duties, the city of London were permitted to bring several of the persons before the Court, who dealt in those things whereof the duty was claimed, to establish the plaintiff's right to it; and where the lord of a manor filed a bill against more than thirty tenants of the manor, freeholders, copyholders and leaseholders, who owed rents to the lord, but had confused the boundaries of their several tenements, praying a commission to ascertain the boundaries, and it was objected, at the hearing, that the suit was improper, as it brought before the Court many parties having

(y) Harrison v. Hogg, 2 Ves. Jun. 323, 328.
(a) 2 Anst. 469. (b) Lord Red. 147.
(c) Mayor of York v. Pilkington, 1 Atk. 282, cited ibid.

distinct interests, it was answered that the lord claimed one general right, for the assertion of which it was necessary to ascertain the several tenements; and a decree was made accordingly. (*d*) Upon the same principle it is that one suit is entertained for tithes against several parishioners. Suits of this nature, however, must all be for *objects of the same nature; and if a bill is filed against several defendants for objects of a different nature, although the plaintiff claims them all in the same character, it will be multifarious; thus, if a parson should prefer a bill against several persons, viz: against some for tithes and against others for glebe, it would be liable to demurrer; and so if the lord of a manor were to prefer one bill against divers tenants for several distinct matters and causes, such as common, waste, several piscary, &c., this would be wrong, though the foundation of the suit, viz: the manor, be an entire thing. (*e*)

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Upon the same ground, in the case before referred to of *Ward* v. *the Duke of Northumberland*, the reason given by the Court for allowing the demurrer of the Duke was, that, although he was interested in every part of the bill, he was so in different characters, and the demands against him were perfectly distinct and unconnected; and that, as one of the executors of his father, he had a right to object to his father's estate being implicated in a litigation concerning his own affairs. And where an information was filed against a public corporation, stating that the corporation was seized of real estates for the purposes of public utility, and of other real estates in trust for private charity, and that the defendants had sold part of the first-mentioned estates, and were selling the remainder, charging also a general misapplication of the funds of the charity, and praying an injunction to restrain the first, and the Court's regulation of the latter, a demurrer for multifariousness was allowed. (*f*)

It is to be remarked that the noble and learned author of the treatise on pleadings in the Court of Chancery appears to confine the meaning of multifariousness to cases where a plaintiff demands several matters of different natures of several defendants by the same bill; (*g*) but in *the Attorney General* v. *the Goldsmiths' Company*, (*h*) Sir L. Shadwell, V. C., says, "I apprehend that, besides what Lord Redesdale has laid down upon the subject, there is a rule arising out of the constant practice of the Court, that it is not competent *where A. is sole plaintiff and B. is sole defendant, for A. to unite in his bill against B. all sorts of matters wherein they may be mutually concerned. If such a mode of proceeding were allowed, we should have A. filing a bill against B., praying to foreclose one mortgage; and, in the same bill, praying to redeem another, and asking many other kinds of relief with respect to many other subjects of complaint." In that case the information against the Company stated that there was a charity for the benefit of young men being free of the Company, and then alleged that divers other bequests had been made to the Company for the purpose of making loans to young men for their advancement in business or life, and prayed that the first-mentioned charity, and all other (if any) like gifts and bequests to the Company might be established, and that the due performance of the charitable trusts might be enforced for the future, &c., and the Vice Chancellor, upon a demurrer being put in to the information *because it was exhibited for several and distinct matters* which ought not to be joined together in one information, held the information to be multifarious, and allowed the demurrer. (*i*)

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(*d*) Magdalen Coll. v. Athill, Lord Red. 148, n.
(*e*) Berke v. Harris, Hardres, 337.
(*f*) Attorney General v. the Corporation of Camarthen, Coop. 30.
(*g*) Lord Red. 147. (*h*) 5 Sim. 670—5.
(*i*) 5 Sim. 670—5.

It should be noticed that, in the above case, there was nothing in the information to show that the character of the bequests was *homogeneous*, and that his Honor held that if there had been any allegation to show that they were of that character, although there might be minute differences between the bequests, they might all have been comprised in the same information; as in the case of *the Attorney General* v. *The Merchant Tailors' Company*, (*k*) where the information prayed the establishment or regulation of a great number of different charitable gifts, which were stated, in the information, to have been made to the Company, by way of bequest or otherwise, on trust, to lend out the same to freemen of the Company, or upon some other like or corresponding trust, for the benefit or advancement of freemen in trade or business. The number of charities in respect of which the relief was sought by the information was eight; but as there were to be applied mainly and substantially for the same objects, and it appeared upon the information that, owing to the minuteness *of the sums, each of them could not be administered as the donors pointed out, the Vice Chancellor thought that the Court ought, at the hearing, to deal with them conjointly, and that the information was not multifarious. (*l*) [*448]

Upon the same principle, it has been held that where matters are joined in the same bill which require the publication of the depositions of the same witnesses at one time, and other depositions from them at a subsequent time, the bill will be multifarious. Thus, in *Dew* v. *Clarke*, (*m*) where the objects of the bill were to perpetuate the testimony of witnesses, and also to obtain immediate relief, founded upon the evidence of the same witnesses, a demurrer for multifariousness was allowed. And so where a bill was filed for a commission to examine witnesses abroad, in support of the plaintiff's case in two separate actions at law, which had been brought against him by the same person for libel, and for an injunction in the meantime, a demurrer for multifariousness was allowed. (*n*) With reference to the last point, it is to be observed, that, in the case of *Kensington* v. *White*, (*o*) the Court of Exchequer held that a bill to restrain a plaintiff at law from proceeding on five different policies of insurance effected on different ships, between the same parties, was not demurrable to for multifariousness; but, in *Shackell* v. *Macauley*, the Vice Chancellor (Sir J. Leach) said that the report of that case was too loose to afford any principle, *and that underwriting causes are not to be relied upon as furnishing general rules. (*p*) [*449]

(*k*) 5 Sim. 288.

(*l*) Attorney General v. Merchant Tailors' Company, 1 M. & K. 189. It is to be noticed that in the above case, the charities respecting which the information had been filed, amounted in number to eight, and that one of the grounds of demurrer was, that there was a defect of parties, because it appeared that the interest of one of the sums was to be paid to another company, which company it was insisted ought to have been made a party to the information, but the Vice Chancellor held otherwise, and over-ruled the demurrer, as well upon that ground as upon the ground of multifariousness. The case, however, was afterwards brought before Lord Brougham, Ch., upon appeal, when his Lordship agreed with the Vice Chancellor upon the question of multifariousness, and held that, had the information been confined to seven branches of the charity, there could have been no objection to it; but he thought that with reference to the eighth charity, the other company ought to have been before the Court; but, as the addition of them as parties might render the suit multifarious, leave was given to amend the information by striking out the matter relating to that charity.

(*m*) 1 S. & S. 108.

(*n*) Shackell v. Macaulay, 2 S. & S. 79.

(*o*) 3 Price, 164.

(*p*) It is submitted, however, that the demurrer of the Court of Exchequer may be supported upon the ground suggested in the course of the argument, namely, that according to the rules of courts of law, where there are several actions by and against the same parties, of such a nature that there may be the same plea and the same judgment in Court, such actions may be consolidated. Cecil v. Briggs, 2 T. R. 639; Brown v. Dixon, 1 T. R. 274.

From the above cases it may be deduced that a plaintiff cannot join in his bill, even against the same defendant, matters of different natures, although arising out of the same transaction; yet, when the matters are *homogeneous* in their character, the introduction of them in the same bill will not be multifarious; and it is to be observed that this distinction will not be affected by the circumstance of the plaintiff claiming the same thing under distinct titles, and that the statement of such different titles in the same bill will not render it multifarious. Thus, where a bill was filed for tithes by the rector of a parish in London, in which the title was laid under a decree made pursuant to the 37th Hen. 8, c. 12, by which payment of tithes was decreed in London at the rate of 2*s.* 9*d.* in the pound on the rents, with a charge that in case such decree should not be deemed binding, the plaintiff was entitled to a similar payment, under a previous decree, made in the year 1535, and confirmed by the same act; and in case neither of the said decrees were binding, the bill charged that the plaintiff was entitled, by ancient usage and custom from time immemorial, to certain dues and oblations calculated according to rent at 2*s.* 9*d.* in the pound, &c., a demurrer for multifariousness was over-ruled. (*q*)

As a bill by the same plaintiff against the same defendant for different matters would be considered multifarious, so, *à fortiori*, would a bill by several plaintiffs, demanding distinct matters, against the same defendants. (*r*) Thus, if an estate is sold in lots to different purchasers, the purchasers cannot join in exhi-
[*450] biting one bill against *the vendor, for a specific performance; for each party's case would be distinct, and there must be a distinct bill upon each contract. (*s*) Upon the same principle, where the heir and next of kin of an intestate, who was an infant, was joined with his sister, who was the other next of kin, as plaintiff in a bill against the widow, who had taken out administration to the intestate's effects, and had also taken possession of the real estate, as guardian to the infant heir for an account both of the real and personal estate, Sir L. Shadwell, V. C., allowed a demurrer for multifariousness, on the ground that the interests in the real and personal estate, were distinct from each other. (*t*) And so where a lay rector and the vicar joined as plaintiffs in a suit, praying that the occupiers might account to them for the tithes respectively due to them, the Vice Chancellor (Sir J. Leach) allowed a demurrer for multifariousness, because they had sought an account of the tithes respectively due to them, which were distinct matters. His Honor, however, observed that it might have been otherwise, if the plaintiffs had alleged that they together were entitled to all the tithes, and had prayed a general account. (*u*) And it has been decided that a bill does not become multifarious because all the plaintiffs are not interested to an equal extent; as in *Knye* v. *Moore*, (*v*) where a bill was filed by a woman and her children to compel the delivery up of a deed by which the defendant had made a provision for the woman, (with whom he had cohabited) and her children, and which had been executed in pursuance of an agreement, whereby he was bound, besides the execution of the deed, to pay to the woman an annuity for her life, an account of which was also sought by the bill; it was objected upon demurrer that the bill was multifarious, because, besides seeking the performance of the agreement under which the mother alone was entitled, it joined to that, the claim for the deed in which
[*451] she was interested jointly with her children; but the *Vice Chancellor (Sir J. Leach) thought that the whole case of the mother

(*q*) Owen v. Nodin, M'Lel. 238, 13 Price, 478 S. C.
(*r*) Jones v. Garcia, del. Rio. 1 Turn. & R. 301.
(*s*) Cowper Eq. Pl. 182.
(*t*) Dunn v. Dunn, 2 Sim. 329, *vide etiam*, Maud. v. Acklom, ib. 331.
(*u*) Exeter College v. Rowland, Mad. & Geld. 94.
(*v*) 1 S. & S. 61.

being properly the subject of one bill, the suit did not become multifarious, because all the plaintiffs were not interested to an equal extent. (*w*)

And so where several persons claim under one general right, they may file one bill for the establishment of that right, without incurring the risk of a demurrer for multifariousness, although the title of each plaintiff may be distinct; thus, in *Powel* v. *the Earl of Powis*, (*x*) where the freehold tenants of a lordship having rights of common over certain lands, the lord *approved* parts of the common lands and granted them to other persons; but the tenants prostrated the fences, upon which actions of trespass were brought against them, and they filed a bill in the Court of Exchequer, in the nature of a bill of peace, against the lord and his grantees, to be quieted in the enjoyment of their commonable rights; a general demurrer was over-ruled, the Court being of opinion that the objection that the plaintiffs might each have a right to make a separate defence to the actions at law, was not valid, as there was one general question to be settled, which pervaded the whole. (*y*)

The proper way in which to take advantage of multifariousness in a bill is by demurrer, and it is too late to object to a suit on that ground at the hearing. (*z*) It seems, however, from the report of the Master of the Rolls' judgment in *Greenwood* v. *Churchill* (*a*) that the objection may be taken by answer, and that though the defendants are precluded from raising the objection at the hearing, the Court itself will take the objection, if it thinks fit to do so, with a view to the order and regularity of its proceedings.

Great care must be taken in framing a bill that it does not contain statements, or charges which are scandalous or *impertinent, for, if it does, it may be objected to by the defendant; and if upon reference to a Master of the Court, to inquire into the foundation of such objection, he should report that the bill does contain matter criminal or scandalous, or not pertinent to the subject of litigation, such parts will be expunged with costs to the party aggrieved; and it is said that the counsel who drew or signed the bill shall pay such costs. [*452]

Scandal consists in the allegation of any thing either in a bill, answer, or any other pleading, which is unbecoming the dignity of the Court to hear, or is contrary to good manners, or which charges some person with a crime not necessary to be shown in the cause; (*c*) to which may be added that any unnecessary allegation bearing cruelly upon the moral character of an individual is also scandalous. (*d*)

There are many cases, however, in which, though the words in the record are very scandalous, and highly reflecting upon the party, yet if they are material to the matter in dispute, and tend to a discovery of the point in question, they will not be considered as scandalous; for a man may be stated on the record to be guilty of a very notorious fraud, or a very scandalous action, as in the case of a brokerage bond given before marriage to draw in a poor woman to marry, or in the case where a man falsely represents himself to have a great estate, when in fact he is a bankrupt; or where one man is personated for

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(*w*) *Vide* observations on this case in Dunn v. Dunn, 2 Sim. 329.

(*x*) 1 Y. & J. 159.

(*y*) In cases of multifariousness in bills by several plaintiffs where some have no interest at all, *ante*, Parties.

(*z*) Ward v. Cooke, 5 Mad. 122, Wynne v. Callander, 1 Russ. 293.

(*a*) 1 M. & K. 559.

(*c*) Prac. Reg. 383.

(*d*) P. Lord Eldon in Coffin v. Cowper, 6 Ves. 514.

another; or in the case of a common cheat, gamester, or sharper, about the town; in these, and many other instances, it may appear to be very scandalous, and not fit to remain on the records of the Court; and yet, perhaps, without having an answer to this very matter, the party may lose his right; the Court, therefore, always judges whether, though matter be *primâ facie* scandalous, it is or is not of absolute necessity to state it; and if it materially tends to the point in question, and is become a necessary part of the cause and material to [*453] the defence of either party, the Court never looks *upon this to be scandalous. (*e*) Were it otherwise, it would be laying down a rule that all charges of fraud are scandalous, which would be dangerous; (*f*) upon this principle, therefore, it has been held that in a bill by a testator's son and heir-at-law impeaching the will on the ground of undue influence exercised by the defendant over the testator's mind, an allegation that at a time specified she was discovered to have been engaged in a criminal conversation with the testator, and that she openly cohabited with him as if she had been his wife, was considered by Sir C. Pepys, M. R., as not scandalous or impertinent; because, supposing an action to be tried at law, and the plaintiff for the purpose of establishing his title, which the will displaced, were to endeavour to impeach the validity of the will, upon the ground that it had been executed under undue influence exercised by the female defendant, it might be a very material part of the evidence that she had many years ago entered into a criminal conversation with the testator, &c. (*g*)

And so it has been determined, that if a bill be filed by a *cestui que trust* for the purpose of removing a trustee, it is not scandalous or impertinent to challenge every act of the trustee as misconduct, nor to impute to him corrupt or improper motives in the execution of the trust, nor to allege that his conduct is the vindictive consequence of some act on the part of the *cestui que trust*, or of some change in his situation. (*h*) It is to be observed, however, that in such a case it would be impertinent, and might be scandalous to state any circumstance as evidence of general malice or personal hostility, without connecting such circumstances with the acts of the trustee which are complained of, because the fact of a party entertaining general malice or hostility against the plaintiff, affords no necessary or legal inference that the conduct of the trustee in any particular instance results from such motive.

[*454] *It has been decided, that under a general charge of immorality, evidence of particular instances of misconduct may be introduced. (*i*) Where therefore such evidence can be made use of under the general charge, the specific instances should not, if it can be avoided, be introduced into the bill; thus it is improper in a suit which is founded upon the want of chastity in a particular individual, as in cases of bills to set aside securities given *turpi considerationе*, to charge particular instances of levity which might affect the character of strangers, and to fill the record with private scandal; because evidence of those particular instances may be given under the general charge. (*k*)

From what has been said before, it may be collected that although nothing relevant can be scandalous; matter, in a bill, may be impertinent without being scandalous. (*l*)

Impertinencies are described by Lord Chief Baron Gilbert to be, "where the records of the Court are stuffed with long recitals, or with long digressions

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(*e*) Gilb. For. Rom. 207. (*f*) Fenhoulet v. Passavant, 2 Ves. 24.
(*g*) *Anon.* 1 Mylne & Craig, 78, *vide etiam* Lord St. John v. Lady St. John, 11 Ves. 526.
(*h*) Earl of Portsmouth v. Fellows, 5 Mad. 450.
(*i*) Whaley v. Norton, 1 Vern. 483, Clarke v. Periam, 2 Atk. 333, 337.
(*k*) Clarke v. Periam, *ubi supra*. (*l*) Fenhoulet v. Passavant, 2 Ves. 24.

of matter of fact, which are altogether unnecessary and totally immaterial to the matter in question; as where a man will tell a tale of a tub, where he sets forth a long deed which is not prayed to be set forth *in hæc verba*, where he stuffs his answer with long recitals which are nothing to the purpose, as where a bill of revivor is brought, and the party will set forth *in hæc verba*, not only the original bill and answer, but the whole proceedings in the cause; whereas, all these being matters of record, and of which the party hath once paid for copies, he ought not to pay for them over again, nor is there occasion to set them forth over again *in hæc verba*, or to make an unnecessary repetition thereof, for they ought to be set forth very concise and short."(*m*) From the above definition it will be seen, that impertinence is the same description of fault in pleadings in equity which in those at common law is denominated *surplusage*. This at law, taken in its largest sense, *includes the introduction of unnecessary matter of whatever description, and includes as well the [*455] admission of matter wholly foreign, as well as of matter which though not wholly foreign, does not require to be stated, or which if stated, should be so with conciseness. (*n*) The former of these species of surplusage, however, is what comes more properly under the description of *impertinence*, whilst the latter may be termed *prolixity*. The attention of the reader is called to this distinction, because some difference of opinion exists concerning the consequence of introducing superfluous matter of the latter class in pleadings in equity. In *Lowe* v. *Williams*, (*o*) Sir J. Leach, V. C., appears to have considered that the proper check to abuses of this description would be in costs, that it would subject a pleader to innumerable difficulties, if relevant matter were to be deemed impertinent, wherever it is less concisely expressed than the nature of the case necessarily requires; and the same opinion appears to have been adopted by Sir W. Alexander, L. C. B., in *Balby* v. *Williams*. (*p*) On the other hand, in *Slack* v. *Evans*, (*q*) Lord Eldon appears to have held that needless prolixity was in itself impertinence, although the matter should be relevant. In that case a motion had been made for a special reference to the Master to tax the costs of a prolix schedule which the Master had reported to be pertinent, and the Lord Chancellor said, "the true question is, whether a case can exist in which a Master can report an answer to be pertinent, but that he cannot do justice without a special reference being made to him to inquire into some prolixity not impertinent. For this no authority is cited; and if I decide with the Master, I must decide that this prolixity is not impertinent, which I should be reluctant to do. If in an examination, the examinant sets forth tradesmens' bills at length, it is impertinent. If pertinence and impertinence be so mixed that they cannot be separated, the whole is impertinent. So a prolix setting forth of pertinent matter is impertinent." The same opinion *was afterwards [*456] adopted by the Court of Exchequer, in *M'Morris* v. *Elliot*, (*r*) and in *Gompertz* v. *Best*, (*s*) Lord Abinger, (L. C. B.,) upon a question of a similar nature, said, "he was disposed to agree with Lord Eldon in thinking prolixity impertinence, but that it was a question of degree." With reference to this point it is to be observed, that, in the orders of the Court, the useless repetitions of deeds and writings in *hæc verba*, causeless recitals, tautologies, and multiplication of words, are enumerated with the other *impertinences* to be avoided; (*t*) upon the whole, however, it must be admitted that it is difficult to lay down any general rule upon the subject, and that the question whether a relevant statement has been made with so much prolixity as to call for the

(*m*) Gilb. For. Rom. 209.
(*o*) 2 S. & S. 575—577.
(*q*) 7 Price 278, n.
(*s*) 1 Younge & Collyer 117.
(*n*) Stephen on Pleading, 422.
(*p*) 1 M'Lel. & Y. 334.
(*r*) 8 Price 674.
(*t*) Beame's Ord. 70, 166.

interference of the Court, further than the expression of its censure, must depend on the circumtances of each particular case.

It is to be observed, that neither scandal nor impertinence, however gross it may be, is a ground of demurrer, it being a maxim of pleading that *utile per inutile non vitiatur*. Where however there is scandal or impertinence in a bill, the defendant is entitled to have the record purified by expunging the scandalous or impertinent matter. In order that this might be done, the course formerly was for the defendant to move the Court for an order to have the bill referred to a Master to report whether it was scandalous or impertinent. This reference was obtained of course, and being general, without specifying the particular passages objected to, (*u*) obviously precluded the party, whose pleading was alleged to be scandalous, from exercising any judgment upon the subject, much less from submitting to have the objectionable passages expunged. To remedy this a regulation has been made, under which no order can be made for referring any pleading, or other matter depending before the Court, for scandal or impertinence, unless exceptions are taken in writing, and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent, nor unless such order *be obtained within six days [*457] after the delivery of the exceptions. (*x*) It is to be observed, with reference to the form of exceptions for impertinence under the above order, that it has been decided that one exception cannot be partially allowed, and therefore if part of an exception be good, and the rest bad, the whole exception must be over-ruled. (*y*)

It is provided by the above order that when any order is made for referring an answer or other pleading, or matter depending before the Court for scandal or impertinence, the order shall be considered as abandoned, unless the party obtaining it shall procure the Master's report within a fortnight from the date of such order, or unless the Master shall within the fortnight certify that a further term, to be stated in his certificate, is necessary in order to enable him to make a satisfactory report; in which case the order shall be considered as abandoned, if the report be not obtained within the further time so specified. (*z*)

The Master, upon a bill answer or other pleading being referred to him, exercises his judgment upon the case, and certifies his opinion thereon to the Court. This certificate is in the nature of a report, of which however he prepares no draft; and as no objections lie to the report, it requires no confirmation by the Court. (*a*) The certificate, however, must be filed at the Report Office, and an office copy taken for *use. A party dissatisfied with the Mas- [458] ter's determination may take the opinion of the Court, by filing

(*u*) 1 Harr. 43.

(*x*) Order 1828, xi, 2 Russ. app. 7. The practice of the Court of Exchequer, with respect to references for impertinence, still remains the same as it was formerly in the Court of Chancery, viz: no exceptions are taken, and, upon motion, of course an order will be made referring it to the Master to look into the pleading and see whether there are any, and what clauses or matters contained in it, which are scandalous and impertinent. 1 Fowl. E. P. 395.

This order being served on the adverse clerk in court, and entered, an office copy thereof is left with the master, and warrants are taken out for the attendance of the other party. If the Master should be of opinion that the bill, or other subject of reference, does not contain scandal or impertinence, he prepares his report accordingly, and the party dissatisfied with his report may take objections in writing thereto, and proceed before him thereon by counsel; and if the Master should over-rule the objections, they are then turned into the form of exceptions, without any other variation, and are set down in the paper to be argued before the Court for its final decision. Ibid.

If the exceptions are disallowed, the report is consequently confirmed, with costs to be taxed, which are to be recovered in the usual way. Ibid 396.

(*y*) Wagstaff v. Bryan, 1 R. & M. 30. (*z*) 2 R. app. 7. Ord. xii.

(*a*) 1 Turn. & V. 781.

exceptions to the report and bringing it on in that shape to be heard. (c) Such exceptions, however, should properly be filed before the expiration of four days from the filing of the report; after which period the Master may proceed, without further order, to expunge the impertinent matter, (if any) and to tax the costs of the reference. (d) A party, however, may take exceptions to the report at any time before the impertinent matter is actually expunged. If, therefore, any delay takes place in proceeding to expunge the impertinence, the plaintiff may avail himself of that delay to file his exceptions, even though the four days have expired. (e)

According to the old practice of the Court, if the Master certified the bill or proceedings to be scandalous or impertinent, and his certificate was not excepted to, the repudiated matter could not be expunged, or the costs taxed, without another order by which it was referred back to the Master to expunge the parts which he had certified to be scandalous or impertinent, and to tax the costs, (f) &c.; but now, according to the late orders of the Court, the original order for referring an answer or other pleading or matter depending before the Court for scandal or impertinence, must contain a direction to the Master to expunge any such scandalous or impertinent matter as he shall certify to be contained therein, and which shall have been the subject of the reference. (g)

By the same order it is provided that the Master is to be at liberty to tax the costs of the reference and consequent thereupon, without further order, which before could not be done: he is also to direct by whom such costs are to be paid. (h) But, in order to allow time for the filing of exceptions to the report, it is further ordered that the scandalous or *impertinent matter shall [*459] not be expunged, nor the costs taxed, until the expiration of four days from the filing of the report of such scandal or impertinence. (i)

By the same order it is directed that the costs, when taxed, are recoverable by *subpœna*, which, however, appears to have been the practice before. (k)

When the Master has reported the bill impertinent or scandalous, and the improper matter is to be expunged, instructions should be given to the party's Clerk in Court to attend with the record at the Master's office; upon his doing which the Master will proceed to expunge the scandalous or impertinent matter, by striking his pen through it, and setting his initials against the clauses expunged; after which the record so purified is brought back by the Clerk in Court, and replaced upon the file in the Six Clerks' office from whence it was taken. (l)

With respect to the time within which it is competent to a defendant to object to a bill, on the ground of *scandal* or *impertinence*, a distinction exists between scandal and impertinence; for it has been held that a bill may be referred for *scandal* in any stage of the suit, (m) but that, for mere impertinence, a reference cannot be obtained after the defendant has answered, or submitted to answer, by obtaining an order for time. It is to be noticed that in *Lady Abergavenny* v. *Lady Abergavenny*, (n) Lord King, C., expressed his disappro-

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(c) 1 Turn. & V. 781.
(d) Ord. 1833, xxii., 1 M. & K. App. xi.
(e) Evans v. Owen, 2 M. & K. 382.
(f) This still continues to be the practice of the Court of Exchequer; and it must be observed that, if a Master has once expunged the objectionable matter, the party cannot then except to the report, because when the scandal, &c., has been expunged, it cannot be made to appear by the record what it was, and it is the party's own fault if he does not except to the report in time. Craven v. Wright, 2 P. Wm. 181.
(g) Ord. 1833, xxi.
(h) Ibid.
(i) Ord. 1833, xxi.
(k) 1 Turn. & V. 782.
(l) Ibid.
(m) *Anon.* 5 Ves. 656, Fenhoulet v. Passavant, 2 Ves. 24, Anon. ib. 631.
(n) 2 Peere, Wms. 311. *Vide etiam, Anon.* 2 Ves. 631.

bation of the practice of referring bills for scandal after answer, and discharged an order so obtained, intimating that it should be observed as a rule for the future not to refer a bill for scandal after the defendant had refused to answer it. (o) His Lordship's determination to alter the old practice of the Court in this respect does appear to have been adhered to. (p)

It appears to have been, formerly, the opinion that, in cases of scandal, "the Court itself was concerned to keep its records clean, and without dirt or scandal appearing thereon;" *and in *ex parte Simpson*, (q) Lord Eldon said that, with reference to the subject of scandal in proceedings, either in causes or in bankruptcy, he did not think that any application by any person was necessary; and that the Court ought to take care that, either in a suit or in a proceeding in bankruptcy, allegations bearing cruelly upon the moral character of individuals, and not relevant to the subject, should not be put upon the record.

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It has been held that any person, even a stranger to the suit, may procure a reference of any record for scandal; (r) but in an *anonymous* case (s) before the late Vice Chancellor, (Sir J. Leach) his Honor is reported to have said that no application can be made by a stranger to the record to refer a bill for scandal. "In order to decide upon the scandal, the Master must be attended with an office copy of the bill, but a stranger to the record has no right to take an office copy of the bill, and the order, if made, might be ineffectual. Besides, the party injured does not require the aid of this Court to remedy the injury done to him, he has his action at law; for if a bill in this Court is made the vehicle for a libel, the party libelled by the record may proceed at common law as on any other writing." His Honor further said "that he had conversed with the Lord Chancellor, (Lord Eldon) and that he concurred in the opinion which he had expressed." (t) It seems, however, that a defendant may refer the answer of a co-defendant; and, although a stranger cannot refer a bill for impertinence, there is no doubt that a defendant, before he has been served with process, may appear *gratis*, and procure an order for such a reference. (u)

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*SECTION V.

Of the Form of a Bill.

Having thus endeavoured to point out the matter of which a bill in equity ought to consist, it remains to direct the reader's attention to the form which is generally considered requisite in every well drawn bill.

The form of an original bill commonly used, according to the analysis of Lord Redesdale, (a) consists of nine parts, some of which, however, are not essential, and may be used or not at the discretion of the person who prepares it. (b)

I. The first part consists of the address to the person or persons holding the Great Seal.

(o) *Vide acc.* Jones v. Langham, Bunb. 53.
(p) *Anon.* 2 Ves. 631, *Anon.* 5 Ves. 656, *vide etiam* Woodward v. Astley, Bunb. 304.
(q) 15 Ves. 476.
(r) *Vide* Coffin v. Cooper, 6 Ves. 514.
(s) 4 Mad. 252.
(t) Coffin v. Cooper, 6 Ves. 514.
(u) Fell v. Christi Coll, 2 Bro. C. C. 279.
(a) Lord Red. 34.
(b) Ibid. 38.

II. The second part contains the names and addresses of the parties complainant.

III. The third part contains a statement of the plaintiff's case, and is commonly called the stating part of the bill.

IV. The fourth consists of a charge that the defendant unlawfully confederates with others to deprive the plaintiff of his right.

V. The fifth part alleges that the defendants intend to set up a particular sort of defence, the reply to which the plaintiff anticipates, by alleging certain facts which will defeat such defence. This is usually termed the charging part, from the circumstance that the plaintiff's allegations are usually introduced by way of charge instead of statement.

VI. The sixth part contains a statement that the plaintiff has no remedy without the assistance of a court of equity, which is termed the averment of jurisdiction.

VII. The seventh part is the interrogating part, in which the stating and charging part are converted into interrogatories for the purpose of eliciting from the defendant a circumstantial discovery upon oath of the truth or falsehood of the matters stated and charged.

*VIII. The eighth part contains a prayer for relief, adapted to the circumstances of the case. [*462]

IX. The ninth part consists of a prayer that process may issue, requiring the defendant to appear and answer the bill, to which sometimes is added a prayer for a provisional writ, such as an injunction or a *ne exeat regno*, for the purpose of restraining some proceedings on the part of the defendant, or of preventing his going out of the jurisdiction till he has answered the bill. (*c*)

These several component parts of a bill will form the subject of the present section. It is to be observed, however, that in drawing bills, some of them are frequently omitted, and that others are not absolutely necessary. Thus the fourth, or that part accusing the defendant of unlawful confederacy, is sometimes left out, in amicable suits especially, and in bills against peers of the realm, the insertion of such a charge is considered highly improper. The fifth, or charging part of the bill, is also frequently omitted; and the sixth, or averment that the complainant has no remedy without the assistance of the Court; and the seventh, or interrogating part, are not absolutely necessary. (*d*)

1. Address of the Bill.

Every bill must be addressed to the person or persons who have the actual custody of the Great Seal at the time of its being filed; unless the seals are in the King's own hand, in which case the bill must be addressed "*To the King's Most Excellent Majesty in his High Court of Chancery.*" (*e*)

If the Chancellor or Lord Keeper himself be the suitor, he must in like manner direct his bill to the King, (*f*) but all *other persons [*463]

(*c*) Bills on the equity side of the Exchequer used formerly to have a tenth part, in which a clause was introduced, by which the plaintiff stated himself to be a debtor and accountable to His Majesty, for the purpose of giving jurisdiction to the Court, which was only open to the King's debtors, who were allowed to sue there upon the allegation that unless they received justice from the defendant they would be less able to satisfy the debt which they owed to the King. It seems, however, that the omission of this clause would not have rendered the bill liable to demurrer on that ground, and that the allegation is now unnecessary. Cheetham v. Crook, 1 M'Lel. & Y. 315.

(*d*) Cowp. Eq. Pl. 10. (*e*) 2 West Symb. 194. b.

(*f*) Vin. Ab. 385. L. Jud. in Ch. 44, 255, 258. Jud. Auth. M. R. 182. Lord Red. 7. In 1 Prax. Alm. 561, is a precedent of a bill by Lord Chancellor Jefferies, addressed to the King's Most Excellent Majesty, and praying his Majesty to grant the usual process of

must direct their bills to the Lord Chancellor, &c., not to mention the Master of the Rolls himself. (g)

Upon every change in the custody of the Great Seal, or alteration in the style of the person holding it, notice of the form in which bills are to be addressed is generally put up in the Six Clerks' Office.

2. Names and Addresses of the Plaintiffs.

It is not only necessary that the names of the several complainants in a bill should be correctly stated, but the description and place of abode of each plaintiff must be set out, in order that the Court and the defendants may know where to resort to compel obedience to any order or process of the Court, and particularly for the payment of any costs which may be awarded against the plaintiffs, or to punish any improper conduct in the course of the suit. (h)

It seems that a demurrer will lie to a bill which does not state the place of the abode of the plaintiff, (i) and that if the bill describes the plaintiff as residing at a wrong place, the fact may be taken advantage of by plea, (k) though a defendant cannot put in such a plea, after a demurrer upon the same ground, has been over-ruled, without leave of the Court. (l)

The modern practice, however, in such cases is, not to demur or plead to the bill, but to move that the plaintiff may give security for costs, and that in the meantime proceedings in the suit may be stayed. This appears to have been for some time the practice in the Court of Exchequer, (m) and has recently been acted upon in the Court of Chancery by Sir L. *Shadwell. [*464] V. C., in *Sandys* v. *Long*, which case has subsequently received the sanction of Lord Lyndhurst upon appeal. (n)

It is to be observed that in the case above referred to there was only one plaintiff, and it does not appear that there is any decision upon the point, where there have been several plaintiffs. It is presumed, however, from analogy to the practice where there are several plaintiffs, one only of whom is resident abroad, (o) that the Court would not in such case require the plaintiff, who is not properly described, to give security: and it is to be noticed, that where a bill is filed on behalf of infants, it is not necessary or usual to describe the infant plaintiff by his place of abode, because an infant is not responsible either for costs or for the conduct of the suit; the description and place of abode of the *prochein amy* must however be set out.

The order which has been before referred to, (p) by which the penal sum in the bond to be given by the plaintiff by way of security for costs is increased from 40*l.* to 100*l.*, only speaks of cases where the plaintiff is out of the jurisdiction. (q) It has, however, been decided, that it applies to the case now under consideration, and to all other cases where security for costs is required. (r)

Subpœna; and in vol. 2 of the same book, 453, is to be found an answer to the same bill. The final decree in such cases is "*By the King's Most Excellent Majesty in his High Court of Chancery*," and is signed by him. Leg. Jur. in Ch. 256.

(g) *Vide* Leg. Jud. in Ch. 44, where it is stated that in the bundle of Chancery parchments in the Tower there is a bill by Moreton, Keeper of the Rolls, directed to the Right Rev. Father in God Robert, Bishop of Bath and Wells.

(h) Lord Red. 34.

(i) *Vide* Rowley v. Eccles, 1. S. & S. 511.

(k) Ibid.

(l) Ibid.

(m) Collinson v. Cookson, 2 Fowl. 311; James v. Tilladam, ib. 312. 2 Anst. 532, S. C.

(n) 2 M. & K. 487. *Vide etiam* Bailey v. Gundry, 1. Keene, 53.

(o) *Vide ante*, 34.

(p) *Ante*, 38.

(q) Ord. xl., 2 Russ. App. 16.

(r) Bailey v. Gundry, *ubi supra*.

Where a plaintiff sues as executor or administrator, it is not necessary so to describe himself in this part of the bill, though, as we have seen before, it is necessary that it should appear in the stating part that he has proved the will or obtained administration (as the case may be) in the proper court. (s)

It is to be noticed here that, where a plaintiff sues on behalf of himself and of others of a similar class, it should be so stated in this part of the bill, and that the omission of such a statement will in many cases render a bill liable to objection for want of parties, (t) and in other cases will deprive the [*465] *plaintiff of his right to the whole of the relief which he seeks to obtain; thus in the case of a single bond creditor suing for satisfaction of his debt out of the personal and real estate of his debtor, and not stating that he sues "on behalf of himself and the other specialty creditors," he can only have a decree for satisfaction out of the personal estate in a due course of administration, and not for satisfaction out of the real estate. (x) And so one judgment-creditor cannot obtain a decree in a suit by himself alone, against the heir of the *conusor*, for a sale of more than a moiety of the estate, (y) though it is otherwise where there are more judgment-creditors than one, (z) or when one sues on behalf of himself and the other specialty creditors.

3. Stating Part.

The third part of a bill contains the statement of the plaintiff's case. It is in general necessary that the plaintiff's equity should appear in this part, and where a bill, praying an account of the rents and profits of certain premises, merely stated the plaintiff to be entitled as heir-at-law to a particular individual, and that the defendant was in possession, but suggested that the defendant pretended to claim under a devise, and charged that if any such existed, the testator was insane at the time, &c.; the Court of Exchequer, upon demurrer, held the bill to be bad, because the stating part showed merely a case at law, and the only equity consisted in the pretences, and charges in answer to those pretences, whereas there ought first to have been an equitable case averred, and then the pretences and charges would have been properly introduced to support it. (a)

With respect to the manner in which the plaintiff's case should be presented to the Court, it is to be observed, that whatever is essential to the rights of the plaintiff, and is necessarily within his knowledge, ought to be alleged *positively*; (b) *and it has been determined upon demurrer, that it is [*466] not a sufficient averment of a fact, in a bill, to state that a plaintiff "is so informed." (c)

The claims of a defendant may be stated in general terms, and if a matter essential to the determination of the plaintiff's claim is charged to rest within the knowledge of a defendant, or must of necessity be within his knowledge, and is consequently the subject of a part of the discovery sought by the bill, a precise allegation is not required.

In general, however, a plaintiff must state upon his bill, a case upon which, if admitted by the answer, or proved at the hearing, the Court could make a

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(s) *Ante*, p. 416.

(t) *Ante*, Parties, s. 1.

(x) Bedford v. Leigh, 2 Dick. 708; Johnson v. Compton, 4 Sim. 47. If, however, a defect of this description appear at the hearing, the Court will allow the case to stand over, with liberty to the plaintiff to amend. Ibid. Biscoe v. Waring, Rolls, 7 Aug. 1835, MS.

(y) Stileman v. Ashdown, 2 Atk. 477, 608, 610; 1 Amb. 13; S. C. Rowe v. Baut, 1 Dick. 150; Burroughs v. Elton, 11 Ves. 33; O'Gorman v. Comyn, 2 Sch. & Lef. 150; Higgins v. York Buildings Company, 2 Atk. 107.

(z) Burroughs v. Elton, *supra*.

(a) Flint v. Field, 2 Anst. 543.

(b) Lord Red. 33.

(c) Lord Uxbridge v. Staveland, 1 Ves. 56.

decree; and therefore where a bill was filed to restrain a defendant from setting up outstanding terms in bar of the plaintiff's right at law, not stating that there were any outstanding terms or estates, but merely alleging that the defendant threatened to set up some outstanding terms, or other legal estate, the Vice Chancellor allowed a demurrer, his Honor being of opinion that a plaintiff who seeks to restrain a defendant from setting up an outstanding term or estate, ought to state in his bill what sort of a term or estate it is. (*d*)

Although the rules of pleading in courts of equity, especially in the case of bills, are not so strict as those adopted in courts of law, yet, in framing pleadings in equity, the draftsman will do well to adhere as closely as he can to the general rules laid down in the books which treat of common law pleadings, whenever such rules are applicable to the case which he is called upon to present to the Court; "for there can be no doubt that the stated forms of description and allegation, which are adopted in pleadings at law, have all been duly debated under every possible consideration, and settled upon solemn deliberation, and that having been established by long usage, experience has shown them to be preferable to all others for conveying distinct and clear notions of the subject to be submitted to the Court," and if this be so at law, there appears [*467] to *be no reason why they should not be considered as equally applicable to pleadings in courts of equity, in cases where the object of the pleader is to convey the same meaning as that affixed to the same terms in the ordinary courts. Thus as at law, if a man intends to allege a title in himself to the inheritance or freehold of lands or tenements in possession, he ought regularly to say that he is *seised;* or if he allege possession of a term of years, or other chattel real, that he is *possessed;* (*e*) if he allege seisin of things *manurable*, as of lands, tenements, rents, &c., he should say that he was *seised in his demesne as of fee;* and if of things not manurable, as of an advowson, he should allege that he is *seised as of fee and right*, omitting his demesne; (*f*) so there seems to be no reason why the same forms of expression should not be equally proper in stating the same estates in equity. It is indeed the general practice in all well-drawn pleadings to insert them, although they are frequently accompanied with other words, which are sometimes added by way of enlarging their meaning and of extending them to other than mere legal estates, or for the purpose of laying the ground for interrogatories to be put to the defendant in a subsequent part of the bill. Thus in stating a seisin in fee, the ordinary legal form is generally adhered to, with the addition of the words "*or otherwise well entitled unto*," &c. The addition of these words to the averment of an estate in fee simple, formed the subject of discussion in the case of *Baring* v. *Nash*. (*g*) The bill there was filed for a partition, and the plaintiff claimed one undivided tenth of the property under a term of 500 years, (which had been assigned to him,) and alleged that the defendant was seised in fee simple, *or otherwise well entitled to* seven other tenth parts. To this bill the defendant demurred; and one of the grounds of demurrer was, that it was not stated, with sufficient certainty, what estate the defendant had in the seven tenth parts of the property, of which he was alleged in the bill to be seised in fee simple, *or otherwise well entitled unto;* and although the Vice Chancellor, [*468] (Sir T. Plumer,) held that the demurrer was not well *founded, "because the plaintiff, having, as he was bound to do, stated his own interest with precision, could not be supposed so cognizant of the nature of the defendant's interest, which he stated therefore in the way he had, and

(*d*) Stansbury v. Arkwright, 6 Sim. 481. *Vide etiam*, Jones v. Jones, 3 Mer. 161; Barber v. Hunter, cited ib. 170; Frietas v. Dos Sandos, 1 Younge & J. 574.

(*e*) 1 Tidd. 41.

(*f*) Ibid.

(*g*) 1 V. & B. 551.

called for a discovery of the extent of it;" yet the inference to be drawn from the case seems to be, that where precision is necessary in stating a seisin in fee simple, the introduction of the words, *or otherwise well entitled unto*, would render it too uncertain, unless with addition of such words as would have the effect of extending it to an estate in fee.

In recommending the use, in pleadings in equity, of such technical expressions as have been adopted in pleadings at common law, it is not intended to suggest that in equity the use of any particular form of words is absolutely necessary, or that the same thing may not be expressed in any terms which the draftsman may select as proper to convey his meaning, provided they are adequate for that purpose, all that is contended for is, that notwithstanding the looseness with which pleadings in a court of equity may, consistently with the principles of those courts, be worded, yet, where it is intended to express things for which adequate legal or technical expressions have been adopted in pleadings at law, the use of such expressions will be desirable, as best conducing to that brevity and clearness which appear formerly to have belonged to pleadings in equity, and which it has been the object of several orders of the Court to restore and enforce. (*h*) Assuming, therefore, that even in pleadings in equity the same form of words as are used in pleadings at law may generally be introduced with advantage, the reader's attention will here be directed to some of the rules adopted in legal pleadings, which may with good effect be adopted in equity.

Thus it is a rule in pleading at common law that the nature of a conveyance or alienation should be stated according to its legal effect, rather than its form of words. (*i*) Therefore in pleading a conveyance for life with livery of seisin, the proper form is to allege it as a demise for life, for such is its effect in *proper legal description. So a conveyance in tail is, on [*469] the same principle, always pleaded as a gift in tail, and a conveyance of the fee with livery, is described by the word *enfeoffed;* and such would be the form of pleading whatever might be the words of donation used in the instrument itself, which in all the three cases are frequently the same. (*k*) So in a conveyance by lease and release, though the words of the deed of release be "grant, bargain, sell, alien, release and confirm," yet it should be pleaded as a release only, for that is its legal effect. Likewise a surrender (whatever words are used in the instrument) must be pleaded with a *sursum reddidit*, which, alone, in pleading, describes the operation of a conveyance as a surrender. (*l*) Similar methods of expressing the substance of conveyances should also, whenever it is practicable, be adopted in courts of equity, and this is in substance enjoined by Lord Coventry's order, (*m*) which orders, "that bills, answers, replications and rejoinders be not stuffed with repetitions of deeds or writings in *hæc verba* but the effect and substance of so much of them only as is pertinent and material to be set down, and that in brief and effectual terms."

It may be observed, however, that although it is desirable, in stating instruments, that the above order should be adhered to, and that the substance only of such instruments as are necessary to be set out should be stated without repeating them in *hæc verba*, yet cases may arise in which it is convenient to state written documents in their very words. This occurs whenever any question in the cause is likely to turn upon the precise words of the instrument, as in the case of bills filed for the establishment of a particular construction of a will which is informally or inartificially worded: in such bills the words, which are the subject of the discussion, ought to be accurately set out, in order more

(*h*) Beames's Ord. 27, 70, 166.
(*i*) Stephen on Pleading, 311.
(*k*) Stephen on Pleading, 311.
(*l*) Ibid.
(*m*) Beames's Ord. 78. *Vide etiam*, Lord Clarendon's Orders, ibid 165–6.

specifically to point the attention of the Court to them. Indeed, wherever informal instruments are insisted on, upon the construction of which any difficulty is likely to arise, as is frequently the case in agreements reduced into [*470] writing by persons who have not been professionally educated, *or which are insisted on as resulting from a written correspondence, in all such cases the written instruments relied on, or at least the material parts of them, should be set out in *hæc verba*. So also in bills filed for the purpose of carrying into effect written articles, upon the construction of which, although they are formally drawn, questions are likely to arise, such articles, or so much of them as are likely to give rise to questions, should be accurately stated. In many cases also the expressions of an instrument or writing are such that any attempt to state their substance, without introducing the very words in which they are expressed, would be ineffectual; in such cases also it is best that they should be set forth, and where a deed or agreement, or other instrument relied upon by the plaintiff has been lost or mislaid and is not forthcoming, it is useful, if it can be done, to set out the contents of the instrument at length, in order to obtain an admission of those contents from the defendant in his answer.

It may be observed here that, according to the old practice of the Court, when a plaintiff wished to obtain from a defendant an admission as to a particular deed or instrument in his (the plaintiff's) own possession, it was usual to leave the deed or other instrument in the hands of the plaintiff's clerk in court, and, having stated that fact in the bill, to pray that the defendant might inspect it, and after inspection answer the interrogatories applicable to the subject. (*o*) This practice, however, has been for a long time discontinued; and it is now considered sufficient to state upon the bill the date, parties names and substance of the deed or instrument relied upon by the plaintiff, and then to require the defendant to set forth whether a deed, of the nature of that set forth, was not duly executed by and between the parties stated, or some, or one, and which of them, and whether the deed does not bear the date, and is not to the purport or effect before set out, or of some, and what other date, or to some, and what other purport and effect. This form of statement and interrogatory [*471] is calculated to draw from the defendant either an admission or a *denial of the deed, and of all knowledge of it, or of its execution, date and contents, or else a statement of the defendant's knowledge or belief of the parties by whom it was executed, and of its date, tenor, effect, &c.

With reference to the subject of stating written instruments, it may be observed that it is a rule in pleading at law, which may also with propriety be adhered to in equity, that where the nature of a conveyance is such that it would at common law be valid without deed or writing, there no deed or writing need be averred, though such document may in fact exist, but where the nature of the conveyance requires at common law a deed or other written instrument, such instrument must be alleged. (*p*) Therefore a conveyance, with livery of seisin, either in fee or tail, may be pleaded without alleging any charter or other writing of feoffment, gift or demise, whether such instrument in fact accompanied the conveyance or not, for such conveyance might at common law be made by parol only; and though, by the statute 29 Car. 2, c. 3, s. 1, it will not now be valid, unless made in writing, yet the form of pleading remains the same as before the Act of Parliament. (*q*) This arises from the rule which has been adopted that mere regulations introduced by statute do not alter the form of pleading at common law; (*r*) from which it results that where

(*o*) Per Lord Eldon in The Princess of Wales v. The Earl of Liverpool, 1 Swan. 123.
(*p*) Stephen on Pl. 312. (*q*) Ibid. 313.
(*r*) Ibid. n. 1.

an act makes writing necessary to a matter where it was not so at the common law (as in the above case of a possession with livery, or in the case of a lease for a longer term than three years, which is required by the same statute to be in writing, although at law it might be by *parol*,) it is not necessary to plead the thing to be in writing, though it must be proved to be so in evidence. (*s*) The same rule has been adopted with respect to pleadings in equity. Thus in stating a conveyance by bargain and sale, it is not essential to state that it was enrolled, for though such a process is rendered necessary by statute it was not so at common law, and so a bill may be brought for an annuity without stating that it was duly registered. (*t*) Upon *the same principle, in a bill for the specific performance of an agreement, it is not necessary to [*472] state that the agreement was signed, because, before the Statute of Frauds, an agreement was valid, and might be enforced, although it was not signed; the signature, therefore, was a mere matter of regulation, introduced by that statute. Upon the same ground it has been held that an action at law may be brought upon an agreement, without stating it to be in writing (the writing being a circumstance only required by the Statute of Frauds,) although it would be impossible to give any evidence of it upon the trial which is not in writing. In *Whitchurch* v. *Bevis*, (*u*) Lord Thurlow appears to have entertained a doubt whether a demurrer might not hold to a bill brought to enforce an agreement in equity, without stating it to be in writing, because the statute says, "that an agreement which is not in writing shall not avail;" and in *Redding* v. *Wilkes* (*x*) his lordship appears actually to have allowed a demurrer, upon the ground that the bill having set up a parol agreement the facts which were alleged as part performance were not sufficient to take it out of the statute. It is to be remarked, however, that it has been almost the uniform practice to take advantage of the Statute of Frauds by plea or answer, and not by demurrer; and this circumstance Lord Thurlow himself notices in *Whitchurch* v. *Bevis*, and accounts for, from the rule adopted at law, and above referred to, under which an action might be brought upon an agreement without stating it to be in writing, though it is impossible to give any but written evidence of it at the trial.

It is upon the principle above referred to that although stamping is by sundry Acts of Parliament rendered necessary to the validity of a variety of instruments, it is not necessary, nor is it even usual, in pleadings, to aver that such instruments have been duly stamped.

It may be noticed in this place that where an agreement relied upon in a bill is to be collected from the letters between the parties, the letters may be stated in the bill either as constituting the alleged agreement, or as evidence of an alleged parol *agreement. In the first case the defendant may insist that they do not make out a concluded agreement, and that [*473] no intrinsic evidence can be received; in the latter he may plead the Statute of Frauds. (*y*)

When it is stated that, the rule of pleading at law, which directs that where an Act of Parliament introduces a new regulation with regard to conveyances, &c. which before were complete without such regulation, such conveyances, &c. should be stated without averring a compliance with the regulation, may be adopted in pleadings in equity; it is by no means intended to assert that the adoption of such rule is always advisable in pleadings in this Court; all that is meant is, that if in such cases the conveyance or agreement is not stated in the bill to be in writing the omission will not afford ground for a demurrer, and that

(*s*) Ibid. 375.
(*t*) *Vide* Harrison v. Hogg, 2 Ves. J. 327.
(*u*) 2 Bro. C. C. 559–568.
(*x*) 3 Bro. C. C. 401.
(*y*) Birce v. Bletchley, 6 Mad. 17; 1 Sugd. on Vend. 99.

the objection, if any in reality exists, must be taken either by plea or answer; in fact, it is generally important, in a bill for a specific performance, to state the agreement, &c. to have been in writing, and to have been signed, and thereby to afford foundation for an interrogatory as to those points, in order if possible to establish them by the admission of the defendant, and so save the expense of proving them by other evidence.

It is to be observed, also, that this rule of pleading applies only to cases in which the necessity for a conveyance or agreement being in writing, is superadded by statute to things which at common law might have been by parol; but where a thing is originally created by Act of Parliament, and required to be in writing, it must then be stated, with all the circumstances required by the Act. (z) Thus a devise of lands (which at common law is not valid, and is authorized only by the statutes 32 Hen. 8, c. 1, and 34 Hen. 8, c. 5,) must be alleged to have been made *in writing*, which is the only form in which those statutes authorize it to be made. (a)

In pleading a devise, however, it is only necessary to set it out as having been in *writing*, which is the form required by the Statute of Wills; for [*474] although by the Statute of Frauds, *before referred to, certain other forms are required to render a devise of freehold property valid, yet as these are mere matters of regulation introduced by the statute, a compliance with them is not, upon the principle before laid down, necessary to be shown in pleading. It is however a usual form, in stating a devise of real estates in a bill, to aver not only that the will was in writing, but that it was *executed and attested in such manner as by law is required to pass freeholds by devise*, which is done for the purpose of affording an opportunity of eliciting from the defendant an admission, by answer, that the requisites of the statute have been complied with, by which the expenses and delay of examining witnesses to prove the fact may be obviated.

Some doubt appears to be entertained whether in suits under the 8 Geo. 2, c. 13, and 7 Geo. 3, c. 5, by which the property in certain prints is vested in the inventors for a certain number of years from the day of publishing, it is necessary to state that the name of the engraver and date of the print have been engraved on the print as required by the Act. In *Blackwell* v. *Harper*, (b) Lord Hardwicke was of opinion that the clause in the Act was only directory, and that the property was vested absolutely in the engraver, so as to entitle him to sue, although the *day* of publication was not mentioned, and compared it to the clause under the statute of Ann, (c) which requires entry at Stationers' Hall, upon the construction of which it has been determined that the property vests, although the direction has not been complied with. Lord Ellenborough also held, at *nisi prius*, (d) that an action might be maintained, although the proprietor's name was not inscribed; observing that the interest was vested by the statute, and that the common law gave the remedy. (e) On the other hand it appears to have been taken for granted by the Court of King's Bench, in the case of *Thompson* v. *Symonds*, (f) though it became unnecessary to decide the point, that both the [*475] name and the date should *appear; and in *Harrison* v. *Hogg*, (g) Lord Alvanley stated that he differed from Lord Hardwicke, and that it was his opinion that the insertion of the name and date was essential to the plaintiff's right.

(z) Steph. on Plead. 313.
(a) Ibid.
(b) 2 Atk. 95; Barn. Ch. Rep. 213.
(c) 8 Ann. c. 19.
(d) Beckford v. Hood, 7, T. R. 620; Buller v. Walker, cited 2 Atk. 94.
(e) Roworth v. Wilks, 1 Campb. 97.
(f) 5 T. R. 41.
(g) 2 Ves. J. 323.

It has been before stated, that it is a rule in pleading that whenever at common law a written instrument was not necessary to complete a conveyance, it is not necessary in pleading to aver it, although such an instrument has been rendered necessary by statute, and has been executed; the converse of this is also a rule, so that whenever a deed in writing is necessary by common law it must be shown in pleading; therefore if a conveyance by way of *grant* be pleaded a deed must be alleged, because matters that "*lie in grant*," according to the legal phrase, can pass by deed only. (*h*) Thus in *Henning* v. *Willis*, (*i*) where the plaintiff filed a bill for tithes, and set up by way of title a *parol* demise by the impropriator for one year, the defendant demurred for want of title in the plaintiff, and the plaintiff submitted to the demurrer. Upon the same ground in *Jackson* v. *Benson*, (*k*) where the bill prayed an account of tithes, and merely stated that the impropriate rector *demised* the tithe to him, a demurrer put in by the defendant, was considered to be well founded; and in *Williams* v. *Jones*, (*l*) the same objection was taken at the hearing, and would have prevailed, had it not appeared that the impropriators had originally been made parties to the suit, but had been dismissed in consequence of their having disclaimed all interest in the tithes in question. (*m*)

It may be noticed here that, in stating deeds or other written instruments in a bill, it is usual to refer to the instrument itself, in some such words as the following, viz: "*as in and by the said indenture, reference being thereunto had, when produced will more fully and at large appear.*" The effect of such a reference is to make the whole document referred to part of the record. It is to be observed that it does not make it evidence: in order to make a document evidence, it must, if not admitted, be proved in the usual way; but the *effect of referring to it is to enable the plaintiff to rely upon [*476] every part of the instrument, and to prevent his being precluded from availing himself, at the hearing, of any portion, either of its recital or operative part, which may not be inserted in the bill, or which may be inaccurately set out. Thus it seems that a plaintiff may, by his bill, state simply the date and general purport of any particular deed or instrument under which he claims, and that such statement, provided it is accompanied by a reference to the deed itself, will be sufficient. As in *Pauncefort* v. *Lord Lincoln*, (*n*) where the plaintiff's claims were founded on a variety of deeds, wills, and other instruments; but to avoid expense, or for some other purpose, the dates and general purport only of the deeds, &c., were stated in the bill, with a reference to them. This manner of stating the case does not appear to have been considered as a ground of objection to the bill; but when the cause was brought to a hearing, the Master of the Rolls referred it to the Master to state the rights claimed by the plaintiff under the several deeds, &c., mentioned in the bill, and reserved costs and further directions until after the report, and the cause was afterwards heard, and a decree made, on the report which stated the deeds, &c.

It is obvious that the method of stating the plaintiff's title, adopted in the above-mentioned case, was one of great inconvenience; and although it has been referred to here, it is by no means from a wish to recommend its adoption as a precedent. It is always necessary in drawing bills to state the case of the plaintiff clearly, though succinctly, upon the record; and in doing this, care should be taken to set out concisely those deeds which are relied upon, and those parts of the deeds which are most important to the case.

Although in bills in equity the same precision of statement that is required in pleadings at law is not attainable, yet it is absolutely necessary that such a con-

(*h*) Stephen on Pleading, 313.
(*i*) 3 Wood. 29.
(*k*) M'Cleland, 62, 13 Pri. 131.
(*l*) 1 Younge, 252.
(*m*) *Vide ante*, 303.
(*n*) 1 Dick. 362.

venient degree of certainty should be adopted as may serve to give the defendant full information of the case which he is called upon to answer. In *Cresset* [*477] v. *Mitton*, (o) Lord Thurlow observed, "special *pleading depends upon the good sense of the thing, and so does pleading here; and though pleadings in this Court run into a great deal of unnecessary *verbiage*, yet there must be something *substantial*:" and in Lord Redesdale's treatise it is said, that the rights of the several parties, the injury complained of, and every other necessary circumstance, as time, place, manner, or other incidents, ought to be plainly yet succinctly alleged.

With respect to the allegation of time, it is to be observed that, where it is material, it ought to be alleged with such a degree of accuracy as may prevent any possibility of doubt as to the period intended to be defined. Thus in prescribing for a modus in a bill, it is necessary that a time for the payment of it should be mentioned; (p) and, formerly, it appears to have been considered that not only the day of payment should be mentioned, but that laying the day of payment *on or about* a particular day was too uncertain; (q) in *Richards* v. *Evans*, (r) however—in which another case in the Exchequer, (Trinity Term, 5 Geo. 1,) to the same effect as the one last referred to appears to have been cited—Lord Hardwicke said, that as to the general question whether it were necessary to lay and prove a particular day of payment, the case in the Exchequer was certainly so determined, but he remembered that it gave general dissatisfaction in Westminster Hall, and abroad, as too nice to require the proof of a particular day; and that it had been since adjudged to the contrary, that on or about is sufficient; so that they had left off taking off that exception in the Exchequer. The authority of this decision has since been acknowledged by the Court of King's Bench, in *Roberts* v. *Williams*; (s) and, in a recent case in Chancery, (t) it has been decided that, in ordinary cases, the laying of an event *on or about* a certain day of a certain month or year, is a sufficient specification of time. In that case the bill, which prayed that the defendant might [*478] be restrained from setting up a term of 500 years, in bar of *an action of ejectment which the plaintiff had brought against the present possessor, alleged that the plaintiff's title accrued on the death of an individual named, which happened *on or about* the 2d July, 1806, and the defendant demurred on the ground that the period alleged in the bill, as the time of the death of the individual named, was more than 21 years (the period required by the stat. 3 & 4 Will. 4, c. 27, s. 2 & 24, to bar suits) before the filing of the bill, which took place in 1824. When the demurrer was first argued, the Vice Chancellor was of opinion that the words, *on or about* the 2d July, 1806, did not fix any precise date, and that it might mean many years before, or many years after that time; and over-ruled the demurrer. Upon appeal, however, the Lords Commissioners (Sir C. Pepys and Sir J. B. Bosanquet,) reversed the decision of the Vice Chancellor, being of opinion that from the known and accepted use of the expression, "*on or about*," in all the ordinary transactions of life, it was sufficiently definite for all the purposes of demurrer, and did satisfactorily set out the fact, that the person named died in the year 1806.

With respect to the certainty required, in setting out the other incidents in the plaintiff's case, the following cases will serve to show what degree of it is required under the circumstances to which they refer: In the case of *Cresset* v.

(o) 1 Ves. J. 449; 3 Bro. C. C. 480.
(p) Goddard v. Keeble, Bunb. 105; Phillips v. Symes, ib. 171.
(q) Blacket v. Finney, Bunb. 198. (r) 1 Ves. 39.
(s) 12 East. 33.
(t) Leigh v. Leigh, before the Lords Commissioners, Aug. 6 & 8, 1835.

Mitton, (*u*) before alluded to, a bill had been filed to perpetuate testimony to a right of common and of way, and it stated "that the tenants, owners and occupiers of the said lands, messuages, tenements and hereditaments, in right thereof, or *otherwise*, have, from time whereof the memory of man is not to the contrary, had, and of right ought to have, &c." To this bill a demurrer was put in; one of the grounds for which was, that it was not stated as to what messuages in particular the rights of common and of way were claimed; and, in allowing the demurrer, Lord Thurlow said, "you have not stated whether the right of way and common is appurtenant or appendant to the land, &c., that you hold; and you state it loosely that you have such right as belonging to your estate, *or otherwise*, so that your bill is to *have a commission to try any right of common and way whatever." The [*479] same doctrine appears to have been held by the Lord Keeper, (North) in *Gell* v. *Hayward*, (*x*) who, upon a bill to perpetuate the testimony of witnesses touching a right of way, held, that in such a bill the way ought to be laid exactly *per et trans*, as in a declaration at law. And so in *Ryves* v. *Ryves*, (*y*) where a bill was filed for a discovery of title-deeds, relating to lands in the possession of the defendant, and for the delivery of the possession of such lands to the plaintiff, &c., upon a loose allegation, that, under some deeds in the custody of the defendants, the plaintiff was entitled to some interest in some estates in their possession, but without stating what the deeds were, or what the property was to which they applied, a demurrer was allowed. In *Loker* v. *Rolle*, (*z*) however, where a bill was filed to recover the possession of an estate in the hands of a defendant, on the ground that the defendant had got the title-deeds, and had intermixed the boundaries of the estate with his own, a demurrer was allowed, because the plaintiff, in his bill, had described the property, which was in contradiction to his averment that he did not know the lands, upon which averment his right to apply to equity for relief, which he might otherwise have had at law, was founded. (*a*)

Upon the same principle, in bills to establish a modus, or other customary payment, in lieu of tithes, a considerable degree of accuracy is required in setting out the modus; thus, if it is a modus applicable only to a particular portion of lands in the parish, as in the case of an ancient farm, the quantity and boundaries of the lands covered by the modus ought to be stated, in order that the rector may know what the particular lands are in respect of which the exemption is claimed. (*b*) In this respect there is a great difference between the mode of stating a modus in a bill and in an answer, much more precision being required in the former than in the latter, *where it is merely [*480] set up as a defence; and the Court of Exchequer has carried this distinction so far, as to say, that though it was impossible to establish a modus, as laid in a cross-bill, in consequence of the want of sufficient accuracy in describing the farms alleged to be covered by it, yet it was a very different consideration whether the modus, as laid in the answer to the original bill, from which the statement in the cross-bill was copied, might not afford such a defence as would prevent the plaintiff from having a decree for an account. (*c*) The reason of this distinction appears to be, because a land-holder who endeavours to establish a modus is bound to know what his claim is, before he brings

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(*u*) 1 Ves. J. 449; 3 Bro. C. C. 480. (*x*) 1 Vern. 312.
(*y*) 3 Ves. 343. (*z*) 3 Ves. 4.
(*a*) *Vide etiam*, East India Company v. Henchman, 1 Ves. J. 287, where upon demurrer Lord Thurlow gave to the plaintiff leave to amend his bill, on the sole ground that the bill had been framed in a very loose way.
(*b*) Scott v. Allgood, 4 Gwil. 1369; 1 Anst. 16, S. C.
(*c*) Scott v. Allgood, *supra*; Athyns v. Lord Willoughby de Brooke, 4 Gwil. 1412.

it into Court, and is therefore tied down to an accurate statement of it; but, in an answer, a tenant is bound, within a limited time, to show whether he has any defence to make or not, and if he give such a statement as will inform the plaintiff of the general nature of the case to be brought against him, it will be sufficient. (*d*)

The principle which requires a sufficient degree of certainty in the statement of a bill, has been further illustrated in the case of *Stansbury* v. *Arkwright*, (*e*) before referred to, where a bill to restrain a defendant from setting up outstanding terms in bar to the plaintiff's claim at law, was held to be demurrable to, on the ground that it did not allege what sort of term or estate was outstanding.

The rule which prescribes that a plaintiff shall not sustain a bill unless he has employed such a degree of certainty in setting out his case as may enable the defendant to ascertain the precise grounds upon which it is filed, applies to all cases in which a person comes to a court of equity for relief upon a general allegation of error, without specifying particulars; (*f*) and if a party, seeking to open a settled account, files his bill without such a specification of errors, he will not be permitted to prove them at the hearing, even though the settlement of the account is expressed to be, *errors excepted*, which is the usual form observed in settling accounts. (*g*) [*481] *And it should be noticed that where a plaintiff files a bill for a general account, and the defendant sets forth a stated one, the plaintiff must amend his bill, because a stated account is *primâ facie* a bar till the particular errors in it are assigned. (*h*) Upon the same ground it has been held that an award is a bar to a bill brought for any of the matters intended to be bound by it, and that if a bill is filed to set aside the award as not being final, &c., the specific objections to it must be stated upon the bill. (*i*)

It is to be remarked that in most of the cases above cited, the question has come before the Court upon demurrer, which seems to be the proper way in which a defendant ought to take the objection that a bill is deficient in certainty; the question, whether, in case the defendant omits to avail himself of this method of objection, and puts in an answer, he can be admitted at the hearing to insist upon the same sort of exactness in statement, which he might have insisted upon had he demurred, was the subject of discussion in a case before Lord Redesdale, in Ireland. (*k*) A bill was filed to set aside a decree of foreclosure, which had been made in the absence of the mortgagor, in pursuance of the statute (7 Geo. 2, c. 14, Irish,) "for making the process in courts of equity more effectual against mortgagors who abscond, and cannot be served therewith, &c.," upon the ground that the mortgagor came within the eighth section of the Act, which saves the right of infants, *persons of non-sane memory*, &c., and it was merely charged in the bill that the mortgagor "was of a weak and feeble understanding, approaching almost to idiotcy," though it was proved, by the evidence, that he was incapable of managing his affairs. Lord Redesdale at first appeared to think that, although the allegation would not have been sufficiently precise to support the bill had it been demurred to, yet as it had not been objected to in that manner, and as the evidence showed that the plaintiff was a person of extremely weak understanding, he was warranted in admitting it. His Lordship observed, "but it may be said that the bill not having stated with sufficient

(*d*) Baker v. Athill, 4 Gwil. 1423; 2 Anst. 491, S. C.
(*e*) *Ante*, 406.
(*f*) Taylor v. Haylin, 2 Bro. C. C. 310; 1 Cox, 435, S. C.; Johnson v. Curtois, 3 Bro. C. C. 266.
(*g*) Ibid.
(*h*) Dawson v. Dawson, 1 Atk. 1.
(*i*) Routh v. Peach, 2 Anst. 519.
(*k*) Carew v. Johnston, 2 Sch. & Lef 280.

precision the *degree of incapacity which the Act requires, the fact of 'non-sane memory,' within the Act, was not in issue in the cause. This is a point which has a little disturbed my mind, and, before I finally decide, I should like to consider how far this loose manner of stating, in bills in equity, will warrant the Court in receiving the evidence offered. I wish on many accounts that pleadings in equity were more precise than they are, at the same time it is to be considered that they will not admit of the same precision as pleadings at law. If, indeed, a defendant in equity puts in a plea, considerable precision is required, because he seeks to reduce his case to one point. If, on a bill filed, to carry this decree into execution against the heir, he had pleaded that the person against whom the decree was made was 'a person of weak mind and almost an idiot,' I should have held that a bad plea, as a plea, although it might have stood for an answer; but whether the same sort of exactness is necessary, in the statement in a bill to which no demurrer is put in, is a question to be considered." His Lordship, however, said afterwards, that as to whether the case was within the Act of Parliament, he rather thought he could not bring it within it; and it is to be observed, that though he subsequently gave judgment in favour of the plaintiff's right to set aside the decree, it was not upon the ground of the mortgagor having come within the saving section of the Act, but because the decree appeared to have been fraudulently obtained by taking advantage of the mortgagor's imbecility of mind. Little, therefore, can be collected from that case against a defendant's right to make the same objection for want of certainty in the allegation of the bill, at the hearing, that he might have done by demurrer. [*482]

4. Charge of Confederacy.

This part of the bill contains a general charge that the defendant "*combining and confederating with divers persons, at present unknown to the plaintiff, but whose names when discovered the plaintiff craves to be at liberty to insert in his bill, with apt and proper matter and words to charge and make them parties defendants to the bill,*" refuses to do *that justice to the plaintiff which he requires or is entitled to. This charge, although generally introduced in a bill, is not necessary: and may be, and in amicable suits frequently is, omitted. (*k*) The practice of inserting it is said to have arisen from an idea that, without such a charge, additional parties could not be added to the bill by amendment; and in some cases the charge has been inserted with the view to give the Court jurisdiction. (*l*) But it is quite certain that, in cases where the charge is not introduced, parties may be added by amendment, and also that the Court has jurisdiction without such allegation. (*m*) [*483]

Upon this subject, Lord Redesdale observes, that it has been, probably for this reason, generally considered that a defendant demurring to a bill, comprising persons whose interests are so distinct that they ought not to be made parties to the same bill, ought to answer the bill so far as to deny the charge of combination. It has been decided, however, that an answer to a charge of unlawful combination cannot be compelled; (*n*) and that a charge of lawful combination, to render it material, ought to be specific: for where persons have a common right, they may join together in a peaceable manner to defend that right, and though some of them only may be sued, the rest may contribute to their defence at their common charge; (*o*) and if on the ground of such a combination the jurisdiction of a court of equity is attempted to be sustained, where

(*k*) Prac. Reg. 63.
(*m*) Cowp. Eq. Pl. 14.
(*o*) Hob. 92.
(*l*) Lord Red. 32.
(*n*) Oliver v. Haywood, 1 Anst. 82.

the jurisdiction is properly at common law, the combination ought to be specially charged, that it may appear to warrant the assumption of jurisdiction in a court of equity. (p)

From whatever cause the practice of charging combination has arisen, it is still adhered to, except in the case of a Peer, who is never charged with combining with others to deprive the plaintiff of his right, either from respect to the peerage, or, perhaps, from an apprehension that such a charge might be construed into a breach of privilege. (q)

[*484] *5. CHARGING PART.

IT was formerly the practice, of pleaders in equity, to state the plaintiff's case in the bill very concisely, and then if any matter was introduced into the defendant's plea or answer, which made it necessary for the plaintiff to put in issue, on his part, some additional fact in avoidance of such new matter, such new fact was placed upon the record by means of a special replication. In order to avoid the inconvenience, delay, and unnecessary length of pleading, arising from this course of proceeding, the practice now in use has been introduced, and wherever the plaintiff is aware, at the time of filing his bill, of any defence which may be made to it, and has any matter to allege which may avoid the effect of such defence, the course now is to insert, after the general charge of confederacy, an allegation that the defendants pretend, or set up such and such allegations by way of defence, and then to aver the matter used to avoid it in the form of charge. This is commonly called the charging part of the bill, and its introduction into practice has, in all probability, led to the discontinuance of special replications, by enabling the plaintiff to state his case, and to bring forward the matter to be alleged in reply to the defence at the same time, and that without making any admission, on the part of the plaintiff, of the truth of the defendant's case. Thus if a bill be filed, on any equitable ground, by an heir who apprehends his ancestor has made a will, he may state his title as heir, and alleging the will by way of pretence on the part of the defendants claiming under it, make it a part of his case without admitting it. It is to be observed, however, that in such case some clear equitable ground, for the interference of the Court on behalf of the plaintiff, must appear in the stating part of the bill, and that if the equity appears only in the charging part of the bill will be liable to demurrer. (r)

It has been before stated (s) that the charging part of a bill may be, and frequently is, omitted; to which it may be added that, in *Partridge* v. *Haycraft*, (t) Lord Eldon said *that "Lord Kenyon never would put in the charging part, which does little more than unfold and enlarge the statement;" and certainly, where such is the only object for its introduction, it may be very properly omitted. In many cases, however, its introduction is highly beneficial, not only for the purpose of introducing matter which would formerly have been the subject of a special replication, but as a foundation for interrogatories which may lead to a discovery of the defendant's case, (t) and likewise of affording grounds for collateral inquiries and directions in the decree which may not necessarily arise out of the case as mainly insisted upon in the bill, but which, in the event of partial success, either on the part of the plaintiff or defendant, may become necessary, but which without some allegation or charge to warrant them in the pleadings could not be introduced. (u)

[*485]

(p) Lord Red. 33.
(q) Ibid.
(r) Flint v. Field. 2 Anst. 543.
(s) *Supra*, 462.
(t) 11 Ves. 575.
(t) Lord Red. 35.
(u) Holloway v. Millard, 1 Mad. 414.

It is to be observed that a charge in the bill, that the defendant pretends that a certain fact has taken place, sufficiently puts that fact in issue; and that where a bill had been filed by one of five residuary legatees for an account of the estate of a testator, and for payment of her fifth part, alleging that one of the defendants pretended that the plaintiff's share of a certain bequest of stock was lapsed, and a decree had been pronounced, reserving that share to the defendant when she should come of age; upon a second bill being filed by the same plaintiff and her husband for the above legacy, the former decree, signed and enrolled, was pleaded in bar; and it was held by Lord Hardwicke, that the allegation, in the original bill, of the pretence that the legacy was lapsed, was sufficient to put the point in issue in that cause, and that the plaintiff was as much bound by the decree against her as if there had been a specific declaration upon the point that she was not entitled. (*x*)

6. Averment of Jurisdiction.

The sixth part of the bill is intended to give jurisdiction over the suit, to the Court, by a general averment that the *acts complained of are contrary to equity, and tend to the injury of the plaintiffs, and that they have no remedy, or not a complete remedy, without the assistance of a Court of Equity. (*y*) It is to be observed, however, that this averment alone will not give the Court jurisdiction, unless a case be shown, in the bill, from which it is apparent that the jurisdiction properly belongs to it. (*z*) The omission of this clause, therefore, will not render the bill defective. [*486]

7. Interrogating Part.

The bill having shown the title, of the persons complaining, to relief, and that the Court has the proper jurisdiction for the purpose, in the seventh place, prays that the parties complained of may answer all the matters contained in the former part of the bill, not only according to their positive knowledge of the facts stated, but also according to their remembrance, the information they may have received, and the belief they are enabled to form on the subject. (*a*)

This answer, in the case of ordinary persons, is required by the bill to be upon oath, although the plaintiff may afterwards, if he thinks proper, dispense with this ceremony, by consenting to, or applying for, an order to that effect. (*b*) The answer of a corporation aggregate is required to be under their common seal; and where a defendant is entitled to privilege of peerage, the answer is required upon the honour of the defendant only, and the oath is dispensed with. (*c*) This privilege of the peerage, as well as all others, except that of sitting in the House of Lords, extends to all Irish and Scotch peers, unless they have waived their privileges by accepting seats in the House of Commons. (*d*)

(*x*) Gregory v. Molesworth, 3 Atk. 626.
(*y*) Lord Red. 35.
(*z*) Ibid.
(*a*) Ibid 37.
(*b*) Ibid 9, 10.
(*c*) Ibid.
(*d*) Robinson v. Lord Rokeby, 8, Ves. 601. The privilege of peerage, which entitles a peer to answer upon his attestation of honour instead of his oath, does not appear to be of very ancient standing, and is traced no higher than the 16th of Elizabeth, Gilb. For. Rom. 48, and it does not appear to have been established till a much later period, for it was contested and refused by Lord Chancellor Egerton, (Treat. on Star Chamber, p. 3, s. 10; *vide* 2 Coll. Jur. 168; Toth. 10, 11,) who said that the honour of a peer did not bind his conscience any more than if he should be permitted to give evidence to a jury at law, upon honour, where, if the jury found contrary to the evidence, no attaint would lie against them. But this privilege has been since fully established by an order of the House of Lords in 1640, by which it was ordered that the nobility of this kingdom, and lords of the upper house of Parliament, and the widows and dowagers of the temporal lords, should answer upon honour only. Cowp. Eq. Pl. 15.

[*487] *As the principal end of an answer, upon the oath of the defendant, is to supply proof of the matters necessary to support the case of the plaintiffs, it is therefore required of the defendants either to admit or deny all the facts set forth in the bill, with their attending circumstances, or to deny having any knowledge or information on the subject, or any recollection of it, and also to declare themselves unable to form any belief concerning it. But as experience has proved that the substance of the matters stated and charged in a bill may frequently be evaded by answering according to the letter only, it has become a practice to add, to the general requisition that the defendants should answer the contents of the bill, a repetition, by way of interrogatory, of the matters most essential to be answered; adding to the inquiry after each fact, an inquiry of the several circumstances which may be attendant upon it, and the variations to which it may be subject, with a view to prevent evasion, and compel a full answer. (*d*) This is commonly termed the interrogating part of the bill; and as it is used only to compel a full answer to the matters contained in the former part of the bill, it must be founded on those matters. Therefore, if there is nothing in the prior part of the bill to warrant an interrogatory, the defendant is not compellable to answer it; (*e*) a practice necessary for the preservation of form and order in the pleadings, and particularly to keep the answer to the matters put in issue by the bill. (*f*) But a variety of questions may be founded on a single charge, if they are relevant to it. Thus, if a bill is filed against an executor for an account of the personal estate of his testator, upon the single charge that he has proved the will may be founded every inquiry which may be necessary to ascertain the amount of the estate, its value, the disposition made of it, the situation of any part remaining undisposed of, the debts [*488] of the *testator, and any other circumstance leading to the account required. (*g*) This rule is stated and acknowledged by Lord Eldon, in *Faulder* v. *Stuart*, (*h*) where a defendant declined, by his answer, setting forth the particulars of a certain consideration, which, it was alleged in the bill, the defendant pretended was paid by him for the purchase of a share in a newspaper, which was the subject of the litigation. His Lordship, upon exceptions to the Master's report upon the sufficiency of the answer being argued before him, said, "It all depends upon this, whether there is such a charge in the bill as to the payment of the consideration as entitles the plaintiff to an answer, not only whether it was paid, but as to all the circumstances, when, where, &c., I have always considered that a general charge enabled you to put all questions upon it that are material to make out whether it was paid; and it is not necessary to load the bill by adding to the general charge that it was not paid, that so it would appear if the defendant would set forth when, where, &c. The old rule was, that, making that substantive charge, you may in the latter part of the bill ask all questions that go to prove or disprove the truth of the fact so stated." (*i*)

It is to be observed, however, that the interrogatories must in all cases be confined to the substantive charge or allegation, and that the plaintiff cannot extend his interrogatories in such a manner as to compel a discovery of a distinct matter not included in the allegation or charge; and therefore, where a bill prayed a discovery in aid of an action at law under the Stock Jobbing Act, (*k*) as to an advance, by plaintiff to the defendant, of a sum of money without legal consideration, which, it was alleged in the bill, was advanced as the premium

(*d*) Lord Red. 36.
(*e*) Ibid. *vide etiam*, Attorney General v. Whorwood, 1 Ves. 534–538.
(*f*) Lord Red. 37.
(*g*) Lord Red. 37.
(*h*) 11 Ves. 296.
(*i*) Ibid.
(*k*) 7 Geo. 2, c. 8.

for liberty "to put upon, detain or refuse stock," or in consideration of certain contracts relating to stock which are void under that Act, and the defendant denied by his answer that the plaintiff did advance or pay to the defendant the sum mentioned, or any other sum as the *premium*, &c., (as charged in the bill,) to which answer an exception was taken because the defendant had not negatived the receipt of *the money in every way which had been suggested in the interrogatory, Lord Eldon over-ruled the exception, [*489] because the interrogatory pointed at a case within the fifth and eighth sections of the Act, in respect of which no bill of discovery was given by the Act, whereas the allegations in the bill related to cases within the first section of the Act, in respect of which a right to file a bill of discovery was given by the second section. (*m*)

It may be noticed here that, in *Attorney General* v. *Whorwood*, (*n*) where interrogatories in a bill were directed to particular facts which were not charged in the preceding part, and the defendant, though not bound to answer them, did so, and the answer was replied to; Lord Hardwicke held that the informality in the manner of charging was supplied by the answer, and that the facts were properly put in issue; "for a matter may be put in issue by the answer as well as by the bill, and, if replied to, either party may examine to it." (*o*)

8. The Prayer for Relief.

The prayer for relief is generally divided into two parts, viz: the prayer for specific relief, and the prayer for general relief.

Although there is no doubt but that a mere prayer for general relief would, in most cases, be sufficient to enable the plaintiff to obtain such a decree as his case entitles him to, (*p*) yet it is the usual and most convenient practice to precede the request for relief, generally, by a statement of the specific nature of the decree which the plaintiff considers himself entitled to under the circumstances of his case.

This part of the bill, therefore, should contain an accurate specification of the matters to be decreed; and, in complicated cases, the framing of it requires great care and attention; for, although where the prayer does not extend to embrace *all the relief to which the plaintiff may at the hearing show [*490] a right, the deficient relief may be supplied under the general prayer, yet such relief must be consistent with that specifically prayed, as well as with the case made by the bill, for the Court will not suffer a defendant to be taken by surprise, and permit a plaintiff to neglect and pass over the prayer he has made, and take another decree, even though it be according to the case made by his bill. Therefore, in *Soden* v. *Soden*, (*q*) where a bill was filed against a woman to compel her to elect between the provision made for her by a will, and that to which she was entitled under a settlement, and the case made by the bill was solely calculated to call upon her to elect, Lord Eldon held, that a declaration that she had elected, so as to conclude her, could not be maintained under the prayer for general relief, being inconsistent both with the case made by the bill, and with the specific prayer that she should make her election. And so where a bill (*r*) was filed by a person in the character of mortgagee, praying a sale under a trust, to which it appeared he was not entitled, the Court

(*m*) Bullock v. Richardson, 11 Ves. 373. (*n*) 1 Ves. 534.
(*o*) Ibid. 538.
(*p*) Cook v. Martyn, 2 Atk. 3; Grimes v. French, ibid. 141; Partridge v. Haycraft, 11 Ves. 570–574.
(*q*) Cited by Lord Eldon in Hiern v. Mill, 13 Ves. 119.
(*r*) Palk v. Lord Clinton, 12 Ves. 48; *vide etiam* Jones v. Jones, 3 Atk. 110.

would not permit him, under the general prayer, to take a decree that the defendant might redeem or be foreclosed, although it was the relief to which properly belonged to his case. And in like manner, where a bill was brought for an annuity or rent-charge under a will, and the counsel for the plaintiff prayed at the bar that they might drop the demand for the annuity and insist upon the land itself, Lord Hardwicke denied it, because it came within the rule before laid down. (*s*) Upon the same principle, where a vendor filed a bill for a specific performance against a purchaser, who had been in possession, under the contract, for several years, but failed in establishing his right in consequence of a defect in his title, the Court refused, under the prayer for general relief, to direct an account of the rents and profits against the purchaser, although he had stated by his answer that he was willing to pay a fair rent. (*t*) And so where a bill [*491] was *filed for the specific performance of a *written* agreement, and parol evidence was read to prove a variation from it, the bill was dismissed with costs, the plaintiff not being allowed to resort to the substantial agreement proved on the part of the defendant. (*u*) But though *in general* a plaintiff can only obtain the decree he seeks by his bill, the case of a plaintiff in a suit for tithes is different; for there, though a plaintiff may fail in establishing his right to tithes in kind, he may yet have a decree for a modus admitted by the defendant's answer. (*x*)

The rule, with regard to the nature of the relief which a plaintiff may have under the prayer for general relief, was laid down by Lord Eldon, in *Hiern* v. *Mill*. (*y*) His Lordship there said, that "as to this point the rule is, that if the bill contains charges, putting facts in issue that are material, the plaintiff is entitled to the relief which these facts will sustain under the general prayer, but he cannot desert specific relief prayed, and under the general prayer ask relief of another description, unless the facts and circumstances charged by the bill will, consistently with the rules of the Court, maintain that relief." In that case a bill had been filed by an equitable mortgagee against the mortgagor, and a person who had purchased from him, with notice of the incumbrance, and it prayed an account, and in default of payment a conveyance of the estate; and although it charged the purchaser with notice, &c. it did not pray any specific relief against him individually. Lord Eldon, however, thought that the relief asked against him at the hearing was consistent with the case made by the bill, and accordingly decreed an account to be taken of what was due to the plaintiff by the mortgagor, to be paid by the purchaser, who was to have his election to [*492] pay the money and keep the *estate. And so, in *Taylor* v. *Tabrum*, (*z*) where a bill was filed against two trustees, alleging that only one of them had acted in the trusts, and praying relief against that trustee only, to which the two trustees put in an answer, admitting that they had both acted in the trusts, the *Vice Chancellor*, (Sir L. Shadwell) made a decree against the two, charging them both with the loss occasioned by the breach of trust.

It is to be observed that, in order to entitle a plaintiff to a decree under the general prayer, different from that specifically prayed, the allegations relied

(*s*) Grimes v. French, 2 Atk. 141. (*t*) Williams v. Shaw, 3 Russ. 178. n.

(*u*) Legal v. Miller, 2 Ves. 299, *vide etiam;* Mortimer v. Orchard, 2 Ves. Jun. 243; Legh v. Haverfield, 5 Ves. 452. But although in such a case the plaintiff cannot have a decree for a different agreement from that set up by his bill, the defendant may have a decree on the agreement such as he has proved it to be. Fife v. Clayton, 13 Ves. 546. The old course required a cross-bill, but the practice now is to decree a specific performance at the instance of the defendant, upon the offer by the plaintiff in his bill to perform the agreement specifically on his part. Ibid. *vide etiam*, Gwynn v. Lethbridge, 14 Ves. 585.

(*x*) Cart v. Ball, 1 Ves. 3. (*y*) 13 Ves. 119.

(*z*) 6 Sim. 281.

upon must not only be such as to afford a ground for the relief sought, but they must have been introduced into the bill for the purpose of showing a claim to relief, and not for the mere purpose of corroborating the plaintiff's right to the specific relief prayed, otherwise the Court would take the defendant by surprise, which is contrary to its principles; therefore, where a vendor filed a bill for a specific performance, but, owing to his not being able to make out a title to some part of the property, was unable to obtain a decree for that purpose, it was held that he could not, under the prayer for general relief, obtain an inquiry into the management of the property during the time it was in the vendee's possession, although the bill did contain charges of mismanagement, which, however, had been introduced, not with the view to obtain compensation, but to establish the fact of acceptation of title by the defendant. (*a*)

The principle upon which the Courts act, under these circumstances, receives considerable illustration from what fell from Lord Redesdale, in *Roche* v. *Morgell*. (*b*) The bill in that case stated various dealings between the plaintiff and defendant, imputing fraud and unfair dealing, and various usurious charges, overcharges and mistakes in accounts delivered, and prayed a discovery of the several transactions, and a general account, and also general relief; to this bill the defendant pleaded a release made by the plaintiff, and a question arose, whether, if the release appeared to be founded on a vicious consideration, and was in itself void, the Court could set it aside, there being no specific prayer for that purpose; *and Lord Redesdale, in delivering his opinion in the [*493] House of Lords upon the point, expressed himself as follows: "It has been objected that the bill does not state the release, and pray that it may be set aside. It seems doubtful whether the release has been put in issue by the bill; but whether it is so or not, if the release appears to be founded on a vicious consideration, it is in itself void, and the Court need not set it aside, but may act as if it did not exist. The bill prays the general account, and all the relief necessary for the purpose of obtaining that account. This prayer is sufficient. It never was thought of that a bill for an account of fraudulent dealings must specially pray that every bond, every instrument taken by the defendant without sufficient consideration, should be set aside. The prayer for general relief is sufficient for the purpose; and upon that prayer the Court may give every relief consistent with the case made by the bill, and continually does give relief in no manner specifically prayed by the bill, and sought for only by the prayer for general relief."

In *Durant* v. *Durant*, (*c*) the Court appears to have gone to a much greater extent, in granting relief under the general prayer different from that specifically prayed, than in any of the other cases where the point has occurred. In that case, articles had been entered into, whereby the lady's father had agreed to settle 5,000*l.* on the lady for her life, to go after her death equally among the children of the marriage. Some time after the marriage a settlement was prepared, by which, instead of pursuing the articles, the 5,000*l.* was so settled that the lady had no interest therein whatever, and the children took it only on the contingency of their arriving at the age of twenty-one. The settlement was prepared when the husband was very ill, and he died without executing it; and there being but one child of the marriage, (who was a daughter) the mother and daughter brought the bill to carry the settlement into execution; but it was so manifestly against the justice of the case, that a settlement should be carried into execution which varied so materially from the articles, that the Court, although it for some time doubted whether, as *the mother and [*494] daughter had joined in the suit to their own prejudice, it could

(*a*) Stevens v. Guppy, 3 Russ. 171. (*b*) 2 Sch. & Lef. 721.
(*c*) 1 Cox, 58.

decree the *articles* to be carried into execution, in direct contradiction to the specific prayer of the bill, ultimately decreed the articles to be carried into execution. It appears, however, upon reference to the Register's book, (*d*) that there were a great many peculiar circumstances in the case, and that it was obviously for the interest of all parties interested under the articles, some of whom were infants, that a proper construction should be put upon them.

It is to be observed that a Court will not in general decree interest upon a balance, unless where it is specifically asked for by the bill. (*e*) Where, however, from peculiar circumstances, interest was not properly due at the time the bill was filed, and a right to interest has subsequently accrued, the Court has, upon further directions, directed interest to be computed, although there was no prayer to that effect in the bill. Thus, in *Turner* v. *Turner*, (*f*) interest was, by order on further directions, directed to be computed upon the balance in executors' hands, although not prayed by the bill, because at the time the bill was filed there did not appear to have been any money in their hands, and the bill could not advert to those circumstances which arose subsequently.

Upon the principle, that the Court will not grant a different relief from that prayed by the bill, it was held by Sir J. Leach, V. C., that where a bill merely prayed a commission to examine witnesses abroad in aid of an action at law. the Court could not grant a motion, that the plaintiff might be at liberty to examine one of the witnesses, who had come to this country and was about to go away again, *de bene esse*, but said that the bill might be amended for that purpose. (*g*)

But although the Court will not under the general prayer grant a different relief from that prayed by the bill, yet when it appears that the plaintiff is entitled to relief, although it be different from that which he has specifically prayed, it will sometimes allow the cause to stand over, with liberty to the plaintiff to [*495] amend his bill. This point was decided by *Lord Rosslyn, in *Beaumont* v. *Boultbee*, (*h*) in which case it appears that, after publication had been passed, the relief prayed for specifically was thought not to be that to which the plaintiff was entitled. He therefore applied for liberty to amend, by adding an additional prayer for relief, which was resisted upon the ground that the answer put in was applicable to the specific relief already prayed; but, after much discussion, Lord Rosslyn determined that it was competent to the plaintiff to amend, by adding the additional prayer. In *Palk* v. *Lord Clinton*, (*i*) above referred to, it appeared at the hearing that the plaintiff was not entitled to the specific relief prayed for, and that, in order to enable the Court to grant the relief upon the case made by his bill, which might, properly. be given, viz: a foreclosure of the mortgage, it would be necessary to bring an additional party before the Court; an order was made that the plaintiff should be at liberty to amend his bill by adding parties, and praying such relief as he might be advised.

The instances, however, in which this will be done are confined to those where it appears, from the case made by the bill, that the plaintiff is entitled to relief, although different from that sought by the specific prayer; where the object of the proposed amendment is to make a new case, it will not be permitted. Thus, where a bill was filed for the specific performance of an agreement for a lease to the plaintiff alone, and it was stated, by the defendant's answer, that the agreement had been to let to the plaintiff and another person

(*d*) Reg. Lib. 1783. A. 192.
(*e*) Weymouth v. Boyer, 1 Ves. J. 416.
(*f*) 1 Jac. & W. 43.
(*g*) Atkins v. Palmer, 5. Mad. 19.
(*h*) 5 Ves. 485; 7 Ves. 599. S. C. stated on this point, *arg*. in Palk v. Lord Clinton, 12 Ves. 63. *Vide etiam*, Cook v. Martyn, 2 Atk. 3.
(*i*) *Ubi supra*, 490, n.

jointly, but the plaintiff nevertheless replied to the answer, and proceeded to establish a case of letting to himself alone, in which he failed; Lord Redesdale, upon application being made to him, to let the cause stand over, with liberty to the plaintiff to amend, by adding the other lessee as a party, said that such a proceeding would be extremely improper. It was not like letting a case stand over to add a party against whom a decree in a plain case could be made, but for the purpose of making a new case, which it would be if founded on a new agreement. (j) *In that case, his Lordship stated that the ordinary practice, where a party has mistaken his case, and brings the cause [*496] to a hearing under such mistake, is to dismiss the bill without prejudice to a new bill; and this practice was adopted by him in *Lindsay* v. *Lynch*, (k) and is in accordance with the decree of Sir William Grant, in *Woollam* v. *Hearn*, (l) and has been subsequently followed by Lord Lyndhurst, in *Stevens* v. *Guppy*. (m)

But although the Court is thus strict in requiring that where the plaintiff prays specific relief, it must be such as he is entitled to from the nature of the case made by the bill, yet where infants are concerned this strictness is relaxed; and it has been determined that an infant plaintiff may have a decree upon any matter arising upon the state of his case, though he has not particularly mentioned or insisted upon it, or prayed it by his bill. (n)

In cases of charities, likewise, the Court will give the proper directions, without any regard to the propriety or impropriety in the prayer of the information. (o)

It sometimes happens that the plaintiff, or those who advise him, are not certain of his title to the specific relief he wishes to pray for; it is therefore not unusual so to frame the prayer that if one species of relief sought is denied, another may be granted. Bills with a prayer of this description, framed in the alternative, are called bills with a *double aspect*. (p)

With respect to the prayer for general relief, although, as has been before stated, it may, in most cases, where it is not preceded by a specification of the particular relief sought, be made the foundation for a prayer at the bar for the particular relief which the plaintiff's case may entitle him; yet there are *cases in which it appears necessary that some specific [*497] relief should be prayed against the defendant, otherwise the bill will be liable to demurrer. Thus in some cases of fraud, where no other relief can be given against a party deeply involved in the fraud charged by the bill, the payment of the costs of the suit by that party ought to form the subject of a specific prayer; for, unless they are so prayed, the Court cannot make an order upon him for payment, and the bill will be liable to a demurrer on his behalf. (q)

It is a principle of equity, that a person seeking relief in equity must himself do what is equitable; it is therefore required, in many cases, that a plaintiff should by his bill offer to do whatever the Court may consider necessary to be

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(j) Deniston v. Little, 2 Sch. & Lef. 11, n.
(k) 2 Sch. & Lef. 1. (l) 7 Ves. 222.
(m) 3 Russ. 171.
(n) Stapilton v. Stapilton, 1 Atk. *vide ante*, 102.
(o) Attorney General v. Jeanes, 1 Atk. 355. *Vide ante*, 15, and *post*. *Information*.
(p) Bennet v. Wade, 2 Atk. 325; Lord Red. 31.
(q) Le Texier v. The Margravine of Anspach, 15 Ves. 159, 164.

done on his part towards making the decree which he seeks just and equitable, with regard to the other parties to the suit. Upon this principle, where a bill is filed to compel the specific performance of a contract by a defendant, the plaintiff ought by his bill to submit to perform the contract on his part; and it is to be observed that the effect of such submission will be to entitle a defendant to decree, even though the plaintiff should not be able to make out his own title to relief, in the form prayed by his bill. (*s*)

Upon the same principle, it was formerly required that a bill for an account should contain an offer on the part of the plaintiff to pay the balance, if found against him; though it seems that such an offer is not now considered necessary. (*t*) And so, where a surety brought an action upon an indemnity bond against his principal, to recover moneys which he had been compelled to pay on his account, and the principal filed a bill in Equity for an injunction and account of their mutual dealings, suggesting fraud, &c., but without offering to pay what was really due to the defendant, the Court of Exchequer thought, that the want of an offer in the bill to make satisfaction, was fatal to the bill, and allowed a demurrer, which had been put in by the defendant. (*u*)

[*498] *It is upon the same ground that Courts of Equity, in cases where a contract is rendered void by a statute, require that a bill to set aside such contract should contain an offer on the part of the plaintiff to pay to the defendant what is justly due to him; so that if a bill be filed, praying that an instrument or security given for an usurious consideration, be delivered up to be cancelled, the only terms upon which a Court of Equity will interfere are those of the plaintiff paying to the defendant what is *bonâ fide* due to him; and if the plaintiff does not offer to do so by his bill, the defendant may demur. (*x*) It seems that there is no difference in this respect between a cross-bill and an original bill. (*y*) The course of proceedings in bankruptcy, however, differ from those in Courts of Equity; for the rule in bankruptcy is, that a debt made void by statute, (such as a debt on an usurious contract,) is void altogether, and cannot be proved at all; and unless the assignees and creditors voluntarily consent to the payment of what is really due, the Lord Chancellor (or Court of Bankruptcy) has not power to order it; and applications of this nature have frequently been refused. (*z*)

It is a rule in Equity, that no person can be compelled to make a discovery which may expose him to a penalty, or to anything in the nature of a forfeiture. As, however, the plaintiff is, in many cases, himself the only person who would benefit by the penalty or forfeiture, he may, if he pleases to waive that benefit, have the discovery he seeks. (*a*) The effect of the waiver, in such cases, is to entitle the defendant (in case the plaintiff should proceed upon the discovery which he has elicited by his bill, to enforce the penalty or forfeiture,) *to come to the Court of Equity for an injunction, which he could not do without such an express waiver. (*b*)

[*499]

(*s*) Stapylton v. Scott, 13 Ves. 425; Fife v. Clayton, ib. 546.

(*t*) Columbian Government v. Rothschild, 1 Sim. 94, 105.

(*u*) Godbolt v. Watts, 2 Anst. 543.

(*x*) Mason v. Gardiner, 4 Bro. C. C. 436; S. C. 1 Fonb. T. Eq. 25; Scott v. Nesbit, 2 Bro. C. C. 641; S. C. 2 Cox, 183; Whitmore v. Francis, 8 Price, 616.

(*y* Mason v. Gardiner, 4 Bro. C. C. 426, Ed. Belt.

(*z*) *Ex parte* Thompson, 1 Atk. 125; *Ex parte* Skip, 2 Ves. 489; *Ex parte* Mather, 3 Ves. J. 373; *Ex parte* Scrivener, 3 V. & B. 14. It does not appear to have been decided what would be the course of the Court in the case of assignees of a bankrupt being obliged to file a bill in Equity, to set aside a contract on the ground of usury.

(*a*) In Mason v. Lake, 2 Bro. P. C. 495, leave appears to have been given to amend a bill, by waiving penalties and forfeitures after a demurrer, upon that ground allowed.

(*b*) Lord Uxbridge v. Staveland, 1 Ves. 56.

It is usual to insert this waiver in the prayer of the bill, and if it is omitted the bill will be liable to demurrer. Upon this ground, where an information was filed by the Attorney General to discover copyhold lands, and what timber had been cut down and waste committed, &c., and the defendant demurred, because, although the discovery would have exposed the defendant to a forfeiture of the place wasted and treble damages, the Attorney General had not waived the forfeitures, the demurrer was allowed. (c) And so it has been held that a demurrer will lie to a bill by a reversioner for a discovery of an assignment of a lease without licence, if it does not expressly waive the forfeiture. (d) Upon the same principle, if a rector or impropriator, or a vicar file a bill for tithes, he must waive the penalty of the treble value, to which he is entitled by the statute of 2 & 3 Edward VI., otherwise his bill will be liable to demurrer. (e) It seems, however, that if the bill pray an account of the *single* value of the tithes only, such a prayer will amount to an implied waiver of the treble value, and that an injunction may be granted against suing for the penalty of the treble value, as well upon this implied waiver as upon the most express. (f) It is to be observed also, that if the executor or administrator of a parson bring a bill for tithes, he need not offer to accept the single value, as the statute of Edward VI. does not give to such persons a right to the treble value. (g)

9. Prayer for Process.

To attain all the ends of the bill, it ninthly, and lastly, prays that process may issue, requiring the defendants to appear to, and answer the bill, and abide the determination of the Court on the subject. (h) The process thus prayed, in ordinary cases, is a writ of *subpœna;* and this part of the prayer [*500] *is commonly as follows: "*May it please your Lordship, the premises considered, to grant unto your orator His Majesty's most gracious writ [or writs] of subpœna, to be directed to the said ———, and to the rest of the confederates, when discovered, thereby commanding them, and every of them, at a certain day, and under a pain therein to be limited, personally to be and appear before your Lordship in this honourable Court; and then and there, full, true, direct, and perfect answer make to all and singular the premises; and further to stand to, perform, and abide such further order, direction, and decree therein, as to your Lordship shall seem meet. And your orator shall ever pray,*" &c. (i)

It is to be observed, that the above words are not usually inserted in the draft by the draftsman who prepares the bill, although they must be added when the bill is engrossed. The draftsman, however, generally writes a direction, in the margin of the draft, for the insertion of this prayer, specifying the names of the persons against whom process is to be prayed; and care must be taken in so doing to insert the names of all the persons who are intended to be made defendants; because it has been held that the mere naming of a party in a bill, without praying process against him as a defendant, is not to be considered as making him a party, even where he is out of the jurisdiction of the Court. (k) Some doubt appears to have been thrown upon the last proposition by the decision of Sir J. Leach, in *Haddock* v. *Thomlinson*, (l) in which his Honor expressed an opinion that where a party interested in the subject of the suit is

(c) Attorney General v. Vincent, Bunb. 192.
(d) Lord Uxbridge v. Staveland, *ubi supra.*
(e) Lord Red. 158; Anon. 1 Vern. 60. (f) Wools v. Walley, 1 Anst. 100.
(g) Anon. 1 Vern. 60; *vide etiam* Attorney General v. Vincent, Bunb. 192.
(h) Lord Red. 37. (i) Hind. 17.
(k) Windsor v. Windsor, 2 Dick. 707. (l) 2 S. & S. 219.

charged by the bill to be out of the jurisdiction of the Court, but is not named in the prayer for process, the omission will not render the record defective; although it is usual and convenient that process should be prayed against them, in order that if they come within the jurisdiction, process may issue against them without amending the bill. In a subsequent case, however, before Sir C. Pepys, M. R., the point again came under the notice of the Court, when his Honor,—after referring to a manuscript report of another case before Sir J. [*501] *Leach, (m) in which that learned judge had said, that it was not enough to state that persons who, in respect of interest, were necessary parties, were out of the jurisdiction, but that the bill must go on to pray process against them,—said that he was of opinion that the principle of the manuscript case ought to be followed, and therefore allowed a demurrer which had been taken *ore tenus* for want of a necessary party, who had been charged to be out of the jurisdiction, but against whom no process had been prayed when he should come within it. (n)

If defendant be a peer of the realm, or entitled to the privilege of peerage, he has a right before a subpœna is issued against him, to be informed, by letter from the Lord Chancellor, of the bill having been filed: this letter is called a letter missive, and must be accompanied by a copy of the bill. In consequence of this privilege of peerage, the practice is that in all cases, where peers are defendants, the usual prayer for process is preceded by a prayer for a letter missive; in the following words: "*May it please your Lordship to grant unto your orator your Lordship's letter missive, to be directed to the said Earl of ———, directing him to appear and answer your orator's said bill, or in default thereof, His Majesty's most gracious writ of subpœna,*" &c. (o)

It is to be observed, that the privilege which entitles a peer to be served with a letter missive and a copy of a bill instead of a subpœna in the first instance, is not merely a privilege of Parliament, but extends to all persons having privilege of peerage; and that therefore Scotch and Irish peers are entitled to it, although they have no seat in the House of Lords as representative peers, unless they have waived their privilege by becoming members of the House of Commons. (p)

When the Attorney General is made a defendant to a suit, as he is always supposed to be in Court, the bill does not pray any subpœna against him, but [*502] merely that, upon being *attended with a copy of the bill, he may appear and put in an answer thereto. (q)

For the purpose of preserving the property in dispute pending a suit, or to prevent evasion of justice, the Court either makes a special order on the subject, or issues a provisional writ; such as the writ of injunction to restrain the defendant from proceeding at common law against the plaintiff, or from committing waste or doing any injurious act; the writ of *ne exeat regno*, to restrain the defendant from avoiding the plaintiff's demands by quitting the kingdom, or other writs of a similar nature. When a bill seeks to obtain the special order of the Court, or a provisional writ for any of these purposes, it is usual to insert, immediately before the prayer for process, a prayer for the order or particular writ which the case requires; and the bill is then commonly named from the writ so prayed, as an injunction bill, or a bill for a writ of *ne exeat regno*. (r)

(m) Manos v. de Tastet.
(n) Taylor v. Fisher, Roll's Sittings after Hil. Term, 1835, M. S.
(o) Hind. 18.
(p) Robinson v. Ld. Rokeby, 8 Ves. 601; Ld. Milsingtoun v. the Earl of Portmore, 1 V. B. 419.
(q) Ld. R. 37; *ante* 183.
(r) Ld. R. 37.

When an injunction is prayed, the object of it is generally mentioned in the specific prayer; and then, after the general prayer, the following words are added before the prayer for process: "*May it please your Lordship, the premises considered, to grant unto your orator not only his Majesty's most gracious writ of injunction, issuing out of and under the seal of this honourable Court, to be directed to the said* ———, *to restrain him from proceeding at law against your orator touching any of the matters in question, but also His Majesty's most gracious writ or writs of subpœnas,*" &c. (*s*)

As the object of the injunction is generally mentioned in the prayer for relief, the above words are not usually inserted by the draftsman, but are added when the bill is engrossed, in the words in which they are prayed.

It does not, however, seem to be absolutely necessary, where the injunction sought is merely provisional, that it should be specified in the particular prayer for relief, provided it be prayed in the manner above pointed out; but it is necessary that it should be specially prayed in one part or other, [*503] *as a proper injunction cannot be granted unless expressly prayed by the bill: (*t*) a prayer for general relief will not be sufficient to authorize it, (*u*) for, as against the general words, the defendant might make a different case than he would against a prayer for an injunction. (*x*)

It is to be observed, that the rule not to grant an injunction, unless specially prayed, applies only to cases where they are required, provisionally, until the hearing of the cause, and that, after decree, the Court will frequently interpose by injunction, although it is not asked for by the bill. (*y*)

Where an injunction is sought not as a provisional remedy merely, but as a continued protection to the rights of the plaintiff, the prayer of the bill must be framed accordingly. (*z*)

The prayer for a *ne exeat regno* resembles that for an injunction *mutatis mutandis*, and, like that, it usually precedes the prayer for process. (*a*) But, though it is usual, it is not necessary that the bill should pray the writ, as the intention to go abroad may arise in the progress of the cause; and if, when the bill is filed, the defendant does not intend to leave the kingdom, it would be highly improper to pray the writ; as a groundless suggestion that the defendant means to abscond would press too harshly, and would also operate to create the very mischief which the Court, in permitting the motion for it to be made without notice, means to prevent. (*b*)

SECTION VI.

In what Cases the bill must be accompanied by an Affidavit.

There are certain cases in which it is necessary that the bill should be accompanied by an affidavit, to be filed with it, and in which the omission of such accompaniment will render the bill liable to demurrer.

(*s*) Hind. 18.
(*t*) Savory v. Dyer, Amb. 70.
(*u*) Wright v. Atkyns, 1 V. & B. 314.
(*x*) Amb. 70.
(*y*) Wright v. Atkyns, *ubi supra;* Paxton v. Douglas, 8 Ves. 520; Jackson v. Leaf, 1 J. & W. 232; Clarke v. Earl of Ormond, Jac. 122, and *post*. Injunction.
(*z*) Ld. R. 38.
(*a*) Hind. 18.
(*b*) Collinson v. ——, 18 Ves. 353.

[*504] *Thus, when a bill is filed to obtain the benefit of an instrument upon which an action at law would lie, upon the ground that it is lost and that the defendant cannot therefore have any relief at law, the Court requires that the bill should be accompanied by an affidavit of the loss of the instrument. (c)

So in suits for the discovery of deeds and writings, and for relief founded upon such instruments; if the relief prayed be such as might be obtained at law, on the production of deeds or writings, the plaintiff must annex to his bill an affidavit that they are not in his custody or power, and that he knows not where they are, unless they are in the hands of the defendant; but a bill for a discovery merely, or which only prays the delivery of deeds or writings, or equitable relief grounded upon them, does not require such an affidavit. (d) It is decided, in *King* v. *King*, (e) to be also unnecessary in the case of a bill for discovery of an instrument which has been fraudulently cancelled by the defendant, and to have another deed executed; for in such a case, if the plaintiff had the cancelled instrument in his hands he could make no use of it at law, and indeed the relief prayed is such as a Court of Equity only can give. The above decision is referred to by Lord Redesdale, in his valuable treatise, as the authority for the position here laid down; but, in *Roolham* v. *Dawson*, (f) its authority appears to have been questioned, and a different decision to have been come to. In that case the bill was filed for the discovery of the contents of a bond which had been given to the plaintiffs, as parish officers, as an indemnification for the expense of a bastard child, and which was alleged in the bill to have been defaced and cancelled by tearing off the signature of the obligor, so that the bond was no longer of force. The bill also prayed an account and payment of what was due on the bond, as well as the execution of a new one for the future indemnification of the trustees. To this bill the defendant demurred, "for that the plaintiffs ought, according to the rules of the Court, to have made an affidavit of the bond being *defaced and avoided, as stated in the bill," [*505] and the demurrer was allowed. It is to be observed, that the Lord Chief Baron, (Sir A. Macdonald) in his judgment, appears to have proceeded upon the ground that the plaintiffs had not confined themselves to seeking a discovery and re-execution of the bond, but had gone on to pray for payment of the sum already due; though certainly that distinction does not appear to have been recognized by the other learned Baron (Thompson) who delivered his opinion upon the occasion. It is, however, submitted that the reason given for the decision in *King* v. *King*, and recognized by Lord Redesdale, is quite satisfactory; for as the ground for the interference of a Court of Equity in such a case is not the loss, but the cancellation of the instrument so as to render it impossible to use it at law, no relief will be granted by the Court until it is satisfied that the cancellation has taken place, by the production of the cancelled instrument: whereas, in the case of the loss of a document, the Court has in general no means of satisfying itself that the document has been lost but the assertion of the party himself, which it consequently requires should be made upon oath.

Another case, in which it is required that the bill should be accompanied by an affidavit, is, where a bill is filed under the stat. 53 Geo. 3, c. 159, which was passed for the purpose of limiting the responsibility of shipowners in certain cases. By the first section of the Act, it is declared that no owner of any ship or vessel shall be liable to make good any loss or damage, occasioned with-

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(c) Ld. R. 43; Walmsley v. Child, 1 Ves. 341; Whitchurch v. Golding, 2 P. Wms. 541.

(d) Ld. R. 43; Anon. 1 Ves. 380; Whitchurch v. Golding, 2 P. Wms. 541; Anon. 3 Atk. 17; Dormer v. Fortescue, 3 Atk. 132.

(e) Mos. 192.

(f) 3 Anst. 859.

out the fault or privity of such owner, which may happen to any goods, wares, merchandize, &c., laden on board any such ship or vessel; or which may happen to any other ship or vessel, or to any goods, wares, merchandize, &c., on board any other ship or vessel, further than the value of his own ship or vessel; and the freight due, or to grow due for the voyage which may be in prosecution, or contracted for at the time of the happening of such loss or damage. And by the seventh section it is enacted, that if several persons shall suffer any loss or damage in or to their goods, &c., ships or otherwise, by any means for which the responsibility of the owners is limited by the Act, and the value of the ship or vessel and freight should not be sufficient to make full compensation to *all such persons, it shall be lawful for the person liable [*506] to make such satisfaction for such damage, or for any one or more of them, on behalf of themselves and the other owners of such ship or vessel, to exhibit a bill in any Court of Equity having competent jurisdiction against all the persons who shall have brought any actions or suit, and all other persons who shall claim or be entitled to any recompense for any loss or damage happening by the same accident or act, to ascertain the amount or value of the ship or vessel's appointments and freight, and for payment and distribution thereof rateably among the several persons claiming recompense, in proportion to the amount of their loss or damage, according to the rules of equity. And by the same *section it is provided*, that the plaintiff or plaintiffs in such bill shall annex to such bill an affidavit *that he, she, or they do not directly or indirectly collude with any of the defendants thereto, or with any other owner or owners of the same ship or vessel, or with any other person or persons, but that such bill is filed for the purposes only of justice, and to obtain the benefit of the provisions of the Act; and that the several persons named as the defendants to the said bill are, as the person or persons making such affidavit verily believes, all the persons claiming to be entitled to recompense for loss or damage sustained by the same accident, act, neglect or default, or on the same occasion; and that all such defendants do claim such recompense, and to be entitled to proportions of the value of such ship or vessel, appurtenances and freight; and that no other person claims to be entitled to any proportion thereof under the provisions of the Act; and that the amount of the value of such ship or vessel, appurtenances and freight, does not exceed a sum to be specified in such affidavit; and that the several claims made by the defendants to such bill do exceed the amount of the value of such ship or vessel, appurtenances and freight.* (g)

The other cases, in which bills are required to be accompanied by an affidavit, may be mentioned here, although they do not come within the description of bills which are now the subject *of discussion. These are bills [*507] for the purpose of examining witnesses, *de bene esse*, where, from circumstances, such as the age or infirmity of witnesses, or their intention of leaving the country, it is probable the plaintiff would lose the benefit of their testimony; in which case an affidavit of the circumstances, by means of which the testimony may probably be lost, must be annexed to the bill; (h) and bills of interpleader, which also, to avoid a demurrer, must be accompanied by an affidavit by the plaintiff that there is no collusion between him or any of the parties. (i)

It is to be observed that, in cases of this nature, advantage can only be taken of the omission of an affidavit, by demurrer; and that where a plaintiff, instead

(g) Under this Act, the plaintiff, on filing the bill, must obtain an order for payment of the value of the ship, appurtenances and freight, into Court. *Vide post*. Interpleading Suits.

(h) Ld. R. 121; Philips v. Carew, 1 P. Wms. 117.

(i) Ld. R. 40.

of demurring on this ground in the first instance put in a plea to the whole bill, which was over-ruled, he was not allowed to demur *ore tenus*, on the ground that the necessary affidavit was not annexed. (*k*)

SECTION VII.

Of Filing the Bill.

After a bill has been drawn, or perused and signed by counsel, it must be fairly engrossed on parchment, and carried to a clerk in court to be filed. The clerk in court first enters it in his cause-book, and then in the general bill-book of the office; after which he marks it at the top, with the day of the month and year on which it was brought into the office, and subscribes his name at the bottom, on the left side: he then delivers it to his six clerk to be filed, or, if the six clerk be absent, he puts it over his study-door, and the six clerk having entered it in his book, files it. (*l*)

In the Court of Exchequer the process of filing bills is nearly the same. They are filed of the term in which the process issues or is tested, and are signed at the head by one of the sworn clerks, who writes the term, the day on which it is filed, and the county thereon; and, after obtaining a [*508] *fiat* from *the Lord Chief Baron, or one of the Barons, at the foot of the bill, for issuing the process, (which is a matter of course) the bill is then entered in the bill-book, under the head of the county where either party dwell, or the property which is the subject of the bill appears to be situated. (*m*)

By the orders of the Court, commonly called Lord Clarendon's orders, it is directed that all bills be dated the same day they are brought into the Six Clerk's Office, and that no six clerk presume to antedate any bill; and that no under-clerk presume to keep any bill by him, but with the first opportunity deliver the same to the six clerk, or his allowed deputy, to be accordingly filed. (*n*)

It is also ordered that no bill, answer, or other pleading shall be said to be of record, or to be of any effect in Court, until the same shall be filed with such of the six clerks with whom it ought to remain; (*o*) and by a previous order, dated in 1646, (*p*) it is ordered that no bills, answers, or other pleadings shall be copied before they be duly filed.

SECTION VIII.

Of amending Bills.

When a plaintiff has preferred his bill, and is advised that the same does not contain such material facts, or make all such persons parties as are necessary to enable the Court to do complete justice, he may alter it, by inserting new matter subsisting at the time of exhibiting his bill, of which he was not then apprised, or which he did not think necessary to be stated, and may add such persons as shall be deemed necessary parties; or in case the original bill shall be found to contain matter not relevant, or no longer necessary to plaintiff's

(*k*) Hook v. Dorman 1 S. & S. 227.
(*l*) Hind. 18.
(*m*) Fowl. Ex. Pr. 115.
(*n*) Beames's Orders, 168.
(*o*) Ibid.
(*p*) Ib. 110.

case, or parties which may be dispensed with, the same may be struck out; and the original bill, thus added to or altered, is termed *an amended bill.* (*q*)

*But, although it is the practice to call a bill thus altered an amended bill, the amendment is in fact esteemed but as a continuation of the original bill, and as forming part of it; for both the original and amended bill constitute but one record, (*r*) so much so, that where an original bill is fully answered and amendments are afterwards made, to which the defendant does not answer, the whole record may be taken, *pro confesso*, generally, (*s*) and an order to take the bill *pro confesso* as to the amendments only will be irregular. (*t*) An amended bill must therefore, in all cases, be addressed to the same Lord Chancellor, Lord Keeper, or Lords Commissioners to whom the original bill was addressed, although a change has taken place in the custody of the Great Seal, between the times of filing the original bill and the amendment. (*u*) [*509]

But, although the original and amended bill constitute but one record, and are so considered at the hearing, the defendant, in case he has answered the original bill, ought to answer the amendments only. (*x*) Where there is a bill, or cross bill, and the plaintiff in the original suit amends his bill before answer he will lose his priority of suit, and his right to have an answer before he is called upon to answer the cross bill. And it seems that, if such amendment be made after an order has been obtained for time to answer the cross bill till the answer to the original bill shall have come in, such order will in that case be discharged upon motion, without costs; (*y*) and where a plaintiff, after amending his bill, obtains an order for time to answer a cross bill till the answer to his original bill shall have come in, the order for time will be discharged for irregularity, with costs. (*z*)

Amendments to a bill are of two sorts, those which relate to parties, and those which affect the substance of the case: amendments relating to parties are either by the addition or omission of them: the practice of the Court, with respect to amendments of this nature, has been before pointed out. There is also another class of amendments relating to parties, *which has been before alluded to; namely, the changing of the situation of the parties, by striking out the name of a co-plaintiff and making him a defendant. This, as we have seen, has been permitted in the case of an infant heir-at-law, who has been improperly made a plaintiff; (*a*) and so, where it was found that the evidence of one of the plaintiffs was necessary to substantiate the title of the others, and the defendant refused to consent to his examination, a motion for leave to amend the bill, by striking out his name as a plaintiff, and adding him as a defendant, was allowed upon the term of the plaintiffs paying the costs, and amending the defendant's copy, and not requiring any further answer. (*b*) [*510]

With respect to those amendments which are made for the purpose of altering the case upon the record, as against the defendants already before the Court, it is not within the province of this work to point out the cases in which such amendments may become requisite, or to what extent they may be made. It is to be observed, however, that a plaintiff ought not to introduce facts by amendments, which have occured since the filing of the original bill, because as the amendments are held to constitute part of the same record as the original bill,

(*q*) Hind. 21.
(*s*) Jopling v. Stuart, 4 Ves. 619.
(*u*) Hind. 22.
(*y*) Johnson v. Freer, 2 Cox, 371.
(*a*) Plunkett v. Joice, 2 Scho. & Lef. 159, *ante* 99.
(*b*) Motteux v. Mackreth, 1 Ves. J. 142. As to the addition of parties by amendment, *vide* 390. As to the omission of parties by amendment, *vide* 398.
(*r*) Vere v. Glynn, 2 Dick. 441.
(*t*) Bacon v. Griffith, ib. n.
(*x*) Ibid.
(*z*) Ibid.

which can only relate to facts which have occured at the time when it was preferred, the introduction of matters of a posterior date would render the record incongruous. Matter, therefore, which has occured since the original bill was filed, should be brought before the Court by supplemental bill, and not by amendment. (c)

Upon this principle, where a plaintiff had, by amendment, introduced a fact [*511] which had occurred subsequently to the *filing of the original bill, and the defendant, by his answer to the amended bill, stated this by way of objection to the new matter, and insisted upon the same advantage as if he had demurred or pleaded thereto; the Master of the Rolls (Sir J. Leach) refused to permit the plaintiff to read evidence at the hearing in support of the allegations introduced by the amendment; and, upon the plaintiff's counsel admitting that without such evidence they could not sustain their case, he dismissed the bill with costs; and his Honor's decision was confirmed by Lord Brougham, upon appeal. (e)

Cases, however, do sometimes occur where the introduction, by amendment, of matters which have occurred since the date of the original bill will be permitted by the Court; thus, where the plaintiff has an incohate right at the time of preparing his original bill, and which merely requires some formal act to render his title perfect; and such formal act is not completed till afterwards, (as in the instance of an executor filing a bill before probate, and afterwards obtaining probate) the introduction of that fact by amendment will be permitted; and, upon the same principle, where a plaintiff filed her bill as daughter and next of kin of an intestate without taking out administration, upon which a demurrer was put in and allowed, and afterwards, to remedy the defect, the plaintiff took out administration to her father, and, having obtained an order, amended her bill by stating the letters of administration; whereupon the defendant pleaded in bar, the fact that the taking out the letters of administration was subsequent to the date of the bill, the Lord Chancellor (Lord Talbot) over-ruled the plea, observing that the mere right to have an account was in the plaintiff, as she was next of kin of her father, and it was sufficient that she had now taken out letters of administration, which when taken out, related to the time of the death of the intestate. (f)

It is to be observed, however, that where, after a bill has been put upon the file, any substantive facts occur which are material to the Court's taking cognizance of the case, or to giving the plaintiff title to relief at all, such matters can- [*512] not *be introduced by amendment; therefore where a bill was filed for an account of an annuity granted by a tenant for life which, amongst other securities, was further secured by a warrant of attorney to confess judgment, and the bill stated that the plaintiffs had caused a memorial of their securities to be enrolled according to the Act of Parliament then in force; (g) but it appeared, at the hearing, that, though a memorial of the annuity deed and of the bond had been enrolled, the warrant of attorney was not included in the memorial, Lord Thurlow, although he at first doubted whether he should not

(c) Archbp. of York v. Stapleton, 2 Atk. 136. As the Court will not permit matter which is proper for a supplemental bill, to be introduced by amendment to an original bill; so it will not permit matter which ought to be the subject of amendment, to be brought before the Court by supplemental bill. Colclough v. Evans, 4 Sim. 76, *vide etiam;* Ryan v. Stewart, 1 Cox, 397; Milner v. Ld. Harewood, 17 Ves. 144, 148; Dean and Chapter of Christchurch v. Simonds, 2 Mer. 469; Knight v. Matthews, 1 Mad. 567; Macneil v. Cabel, 2 Bligh, 228.

(e) Wray v. Hutchinson, 2 M. & K. 235.

(f) Humphreys v. Humphreys, 3 P. Wms. 348.

(g) 17 Geo. 3, c. 26, repealed by 33 Geo. 3, c. 141, and other provisions substituted in lieu thereof.

permit the parties to make a new enrolment of the securities, and, by amending the bill, bring the matter upon the record, ultimately said, that if the cause stood over for the purpose of enrolling the memorial, he did not see how it could be brought upon the record but by a supplemental bill. (*h*)

It sometimes happens that a defendant, in his answer to an original bill, states facts which have occurred since the bill was filed, and the Court have in such cases permitted such facts to be incorporated into the bill by amendment. This point was much discussed in *Knight* v. *Matthews*, (*i*) where the original bill stated, that an action had been commenced against the plaintiff, and the defendant by his answer referred to the trial of the action which had taken place between the time of filing the bill and the putting in of the answer; whereupon the plaintiff amended his bill, and stated the trial and its result. To this bill, so amended, a demurrer and a plea were *put in, and the Vice Chancellor, Sir T. Plumer, over-ruled them both, and in so doing observed, "that in [*513] the interval between the filing of the bill and the answer, many circumstances may have occurred; and the defendant, when he puts in his answer must state the facts as they *then* are, and that if circumstances are introduced in the answer which have occurred subsequent to the filing of the bill, the plaintiff must be allowed to make amendments, so as to show that such new circumstances are not of the colour he represents them, and to obtain a complete answer as to such circumstances.

Where the answer of a defendant states facts which are material to the plaintiff's case, but which have not been stated in the bill, it is not necessary that the plaintiff, in order to avail himself of them at the hearing, should introduce such facts into his bill by amendment, (although perhaps the most convenient course would be to do so,) as the replication to the answer puts all the facts stated in it completely in issue between the parties, and the plaintiff may, after such replication, examine witnesses as to such facts as well as the defendant. (*l*) Where, however, it is important to the plaintiff that a fact disclosed in the answer should be further inquired into, or avoided by some further statement, the practice is often resorted to of introducing such fact from the answer of the defendant into the bill; and where a plaintiff, not being satisfied with the answer, amended his bill, stating, by way of pretence, a quotation from the answer and, negativing it, insisted that the facts would appear differently if the defendant would look into his accounts—the Vice Chancellor (Sir T. Plumer) held, that the matter so introduced was not impertinent. (*m*)

Great latitude is allowed to a plaintiff in making amendment, and the Court has even gone to the extent of permitting a bill to be converted into an information; (*n*) it has also been held, where a plaintiff filed a bill, stating an agreement, and the defendant by his answer admitted that there was an agreement,

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(*h*) Davidson v. Foley, 3 Bro. C. C. 598. It is to be noticed, that in the above case Lord Thurlow ultimately dismissed the bill; from which it may be inferred that his lordship's opinion was, that as the plaintiff's title was defective at the time when the original bill was filed, the defect could not be remedied by a supplemental bill; and this appears to have been the opinion of Lord Brougham, in Pritchard v. Draper, 1 R. & M. 191, in which a bill was instituted by a solicitor for payment of costs due to him from a client, and it appeared upon the answer, that he had not delivered a signed bill conformably to the Act; whereupon the plaintiff delivered a bill, duly signed, and put that fact in issue by supplemental bill. Lord Brougham, upon the cause coming before him, expressed himself of opinion that the defect in the title of the plaintiff, as it stood at the institution of the suit, was not cured, although, as the objection was not urged at the original hearing, he thought it could not be taken on further directions. *Vide post.* "Supplemental Suits."

(*i*) 1 Mad. 566.

(*l*) Attwood v. ———, 1 Russ. 355.

(*m*) Seeley v. Boehm, 2 Mad. 176.

(*n*) President of St. Mary Magdalen v. Sibthorp, 1 Russ. 154.

but different from that stated by the plaintiff, that the plaintiff might amend his bill, abandoning his first agreement, *and praying for a decree [*514] according to that admitted by the defendant. (o) In that case, however, the amendment was permitted because the bill in its original form might have been prepared under a mistake or misconception of counsel, and the plaintiff, having afterwards discovered the error, was allowed by the Court to abandon his original case, and insist upon the one alleged by the defendant; but the Court will not carry its liberality further, and permit a plaintiff to amend his bill, so that he may continue to insist upon the agreement originally stated, and if he fails in that, to get the benefit of the one admitted by the defendant. Upon this principle—where the original bill prayed the specific performance of an agreement, and the defendant denied the agreement as stated in the bill, but admitted a different one, whereupon the plaintiff amended his bill, continuing to insist on the original agreement, and praying in the alternative, if not entitled to that, to have the execution of the admitted agreement—Lord Redesdale dismissed the bill with costs, but without prejudice to any bill the plaintiff might be advised to file to obtain a performance of the admitted agreement. (p)

The question, whether the Court will or will not permit a bill, filed for the mere purpose of discovery, to be converted into one for relief, by the addition of a prayer for relief, does not seem to be settled. It appears, from a note by the noble and learned author of the treatise on Pleading, (q) that it was formerly a frequent practice for the plaintiff, in cases in which it was doubtful, whether he was entitled to relief in equity or at law, to frame his bill, in the first instance, for a discovery only, (so as to avoid a demurrer for want of equity, which, if allowed, would also have precluded his title to the discovery,) and having obtained the discovery to try, by amending his bill, the question whether he was entitled to the relief. This practice, however, appears to have been long discontinued: and in *Butterworth* v. *Bailey*, (r) in which a motion was made before Lord Eldon for leave to amend a bill of discovery, by [*515] *adding a prayer for relief, his Lordship said, that he had no recollection of any such amendment having been permitted, and directed the case to stand over, in order that precedents might be searched for: no such precedents however were found, and his Lordship refused the motion with costs. It is remarkable that, notwithstanding the circumstances mentioned in the last case, as to precedents having been searched for, and not found, two cases are to be found in the books in which the practice of amending bills of discovery, by converting them into relief, has been resorted to. The first, *Hildyard* v. *Cressy*, (s) and the other *Crow* v. *Tyrell*. (t) With respect to the first, however, no question turned upon the propriety of the amendment, and the defendant had, in fact, answered the bill, after it was amended, so that it was not open to him to object to the amendment upon that ground; and with respect to the other case, it seems that although the form of the bill was effectually one for discovery merely, the intention of the plaintiff was to procure relief, and that he had made a case for it. It is to be observed also, that the order in that case was made more in the way of a compromise than as a decision, both parties having made mistakes, (the plaintiff in his bill and the defendant in his plea,) cross motions had therefore been made to rectify their mutual errors.

It should be mentioned that the decision of Lord Eldon, in *Butterworth* v. *Bailey*, was acted upon by the Court of Exchequer in *Jackson* v. *Strong*, (u)

(o) Per Lord Redesdale, Lindsay v. Lynch, 2 Sch. & Lef. 9.
(p) Lindsay v. Lynch, 2 Sch. & Lef. 1; *vide etiam* Woollam v. Hearn, 7 Ves. 222, and Deniston v. Little, 2 Sch. & Lef. 11, n. a.
(q) Ld. R. 149, n. (z).
(r) 15 Ves. 358.
(s) 3 Atk. 303.
(t) 2 Mad. 397.
(u) 1 M'Lel. 245.

but that in a subsequent case before Lord Lyndhurst, *Lousada* v. *Templer*, (x) his Lordship made an order that the plaintiff should be at liberty to amend his bill within fourteen days, by adding a prayer for relief and proper parties, or otherwise as he should be advised, &c. It is to be observed, however, that the order was not made upon a motion for that specific purpose, but upon a motion for a commission to examine witnesses in aid of an action at law, on which occasion the Lord Chancellor, after expressing considerable doubts whether the facts mentioned in the bill would constitute a defence to the action at law, said, he was *inclined to think that whatever benefit the plaintiffs were entitled to derive, from the transactions referred to, [*516] in their resistance to the demand made at law, they might have it more effectually and safely by a bill for relief than by a bill for discovery and commission only; and for that reason made the order. It is also to be noticed, that no objection appears to have been made on the part of the defendants to the course of proceeding thus pointed out by his Lordship, nor were the decisions either of Lord Eldon or of the Court of Exchequer, above noticed, then alluded to.

On a subsequent occasion, however, in the same case, the *dicta* of Lord Eldon, in *Butterworth* v. *Bailey*, were brought forward in support of a motion made by the defendant to have the answer to the original bill taken off the file, upon which motion an order was made that, the defendant should be at liberty to put in an answer to the original and amended bill, as if no answer had been filed to the bill of discovery; and that the plaintiffs should be at liberty to take exceptions to the answer to the original and amended bill, as they should be advised. The plaintiffs were also ordered to pay the costs of the suit up to that time, including the costs of the application. (y)

Upon the whole, therefore, the result of this course of proceeding appears to have placed the plaintiff in a situation very little (if at all) better than he would have been in had he dismissed his original bill for a discovery, and filed a new one for relief; so that it may fairly be questioned whether the decision of Lord Eldon, in *Butterworth* v. *Bailey*, and of the Court of Exchequer, in *Jackson* v. *Strong*, are at all weakened by the course adopted by Lord Lyndhurst in the case last quoted. At all events, it is established that whatever the course adopted by the Court may be, with respect to allowing bills of discovery to be converted into bills for relief, such course will not prejudice the right of the defendants to their costs of the discovery, and to put in a new answer, adapted to the new form given to the proceeding.

In a recent case where a defendant filed a cross-bill for the purpose of getting a discovery only from the plaintiff in the *original suit, but did not put in any answer to it before the hearing of the original cause, in [*517] consequence of which the discovery became useless, whereupon the plaintiff in the cross-bill amended it by converting it into a bill for relief; the Vice Chancellor, upon a motion being made to expunge the amendment, with costs, thought that, under the special circumstances, the plaintiff in the cross-bill might be allowed to convert the prayer for discovery into one for relief, because a cross-bill is to be treated with greater indulgence than an original bill; he therefore refused the motion to expunge, but ordered that part of it, which related to costs, to stand over till the hearing of the cause. (z)

It has been determined by Lord Eldon, that, as a bill for discovery cannot be amended by converting it into a bill for relief, so neither can a bill for relief be converted into a bill for a discovery by striking out the prayer. Thus, in *Earl Cholmondeley* v. *Clinton*, (a) where the defendants, having answered the bill, obtained an order for the plaintiff to elect whether he would proceed at law

(x) 2 Russ. 565.
(y) Ib. 566.
(z) Severn v. Fletcher, 5 Sim. 457.
(a) 2 V. & B. 113.

or in equity; whereupon the plaintiff elected to proceed at law, and moved to dismiss his bill as far as it sought relief, and to amend the record by striking out the prayer for relief, the motion was refused, the Lord Chancellor being of opinion that the better course for the plaintiff would be to dismiss his bill and file another for discovery only, which was done. (*b*)

It is to be observed here, that if a plaintiff takes advantage of an order to amend, so as entirely to change his case and to make the bill a perfectly new one, he will be ordered, upon motion, to place the defendant in the same position, with regard to costs, that he would have been in had the plaintiff, instead of amending, dismissed his original bill with costs and filed a new one. Thus, where a plaintiff originally filed his bill against the defendant as his bailiff or agent, in respect *of certain farms, praying an account against him [*518] upon that footing, and afterwards, upon an issue being directed to try whether he was or was not a mortgagee of such farms, and the jury finding that he was, the plaintiff amended his bill by stating the mortgage, and converting his former prayer for relief into a prayer for a foreclosure; upon the defendant's making a motion, one of the objects of which was, that the amended bill might be taken off the file, and that it might be referred to the master to tax the defendant's costs, and that the amended bill might be taken off the file, Lord Eldon held that, the defendant was entitled to all the costs sustained by him beyond what he would have been put to if the bill had been originally a bill for a foreclosure, and made an order accordingly, although he did not go the length of ordering the amended bill to be taken off the file. (*c*) And so, where a plaintiff by his original bill sought to set aside a deed, but after the answer was filed amended the bill by making quite a different case and praying to establish the deed, the Court, upon motion, ordered him to pay to the defendant the costs of the original bill, and of so much of the answer as related to certain accounts which had been set out, in compliance with the requisition in the original bill, together with the costs of the motion. (*d*)

Upon the same principle, where a plaintiff takes advantage of an order to amend to strike out a portion of his bill, though he does not alter the nature of it, yet, if expenses have been occasioned to the defendant by the part which has been struck out, which, in consequence of its having been so struck out, could not be awarded to him at the hearing, the Court will, upon motion, order such costs to be taxed and paid to the defendant. Thus, where a plaintiff filed a bill which was of great length and prayed relief in a variety of matters, to which the defendants put in answers, which were also of great length, after which the plaintiff, by virtue of a common order to amend, amended his bill and filed a new engrossment, which was very short and confined to one only of the objects of relief *prayed by the original bill, upon the de- [*519] fendants, moving that the order to amend might be discharged, and the bill dismissed with costs, or that the plaintiff might pay to them the costs of putting in their answer to so much of the original bill as did not relate to the relief prayed by the amended bill, the Lord Keeper Henley directed that the order for amending the bill should stand, but ordered that the plaintiff should pay to the defendants the further sum of five pounds beyond the sum of twenty shillings mentioned in the order. (*e*) And where a cause, at the hearing, was ordered to stand over, with liberty to the plaintiff to amend by adding parties,

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(*b*) 2 Mer. 71. In the above case, Gurish v. Donovan, 2 Atk. 166, was cited in argument in support of the motion, but upon reference to the registrar's book, it appeared that the order for striking out the prayer was made by consent, and that an answer was put in by the defendant after the order was made, 2 V. & B. 114, n. a.

(*c*) Smith v. Smith, Cooper, 141.

(*d*) Mavor v. Dry, 2 S. &. S. 113.

(*e*) Dent v. Wardel, 1 Dick. 339.

and the plaintiff took advantage of that order to strike out several charges which had necessarily led the defendant into the examination of witnesses, and to add others, the Court, upon motion, ordered that part of the amendment to be discharged and the plaintiff's bill to be restored to what it was before, in order that, at the hearing, the costs of those parts of the bill which had been abandoned by the plaintiff might be awarded to the defendant. (*f*)

It may be observed here, that any amendment of a bill, however trivial and unimportant, authorizes a defendant, though not required to answer, to put in an answer, making entirely a new defence and contradicting his former answer. This was held by Sir L. Shadwell, V. C., in *Bolton* v. *Bolton*, (*g*) who on this ground refused, with costs, a motion to take an answer to an amended bill off the file, (which answer was filed nearly three years after the bill had been amended, and eight years after the original answer,) which contradicted the original answer, and introduced no less than four new issues or defences.

No alteration can be made in any pleading or other matter, after it has been filed, and by that means become a record of the Court, without the sanction of a previous order. Orders for leave to amend bills are usually granted on the application *of the plaintiff, which may be had, subject to the rules and regulations hereafter pointed out, at any period of the cause [*520] previously to the hearing. Sometimes the Court, at the hearing, will order a cause to stand over, with liberty to the plaintiff to perfect his case by amendment, upon his paying the costs of the day.

Thus, as we have seen, that at the hearing, if the record appears to be defective for want of proper parties, the Court will allow the cause to stand over, for the plaintiff to amend his bill by adding parties, (*h*) or, where the parties are too numerous to be brought before the Court, to alter the form of the bill, by making it a bill by the plaintiffs on behalf of themselves and others. (*i*) This practice is not confined to amendment, by adding parties, we have seen that it will be extended to permit the plaintiff to show why he cannot bring the necessary parties before the Court, &c. (*k*)

(*f*) Bullock v. Perkins, 1 Dick. 110.

(*g*) 29 June, 1831. MSS. *ex relatione*, Beames.

(*h*) *Ante*, p. 389. (*i*) *Ante*, p. 336, 337.

(*k*) Milligan v. Mitchell, *ante*, p. 388, under the above mentioned order the plaintiffs amended their bill by adding several co-plaintiffs, and entitling it as a bill "on behalf of themselves and all other persons (except the defendants) who are entitled to be pew-holders or seat-holders in the church or chapel after mentioned, &c.," and introducing new statements and charges with respect to such plaintiffs; and Lord Cottenham, at the hearing, held, that the amendment was most irregular, and directed the cause to stand over, with liberty to both parties to make such application as they might be advised. The case subsequently came on upon cross motions, one on the part of the defendants to take the amended bill and subsequent proceedings off the file, and the other on the part of the plaintiffs for leave to amend again, when his Lordship ordered that the amended bill should be taken off the file and all subsequent proceedings set aside, the defendants having their costs thereof and of the present motion, without prejudice to the right of the plaintiffs to avail themselves of the liberty given them by the original order to amend, S. C., 1 Mylne & Craig, 433. In consequence of this order the amended bill was taken off the file, and the plaintiffs again amended the original bill by making it a bill on behalf of themselves and of all persons entitled to be pew-owners, &c., and by charging that the pew-owners are so numerous (being above 100 in number) that it was impossible to make them all parties to the suit; upon a motion to take the second amended bill off the file, on the ground that the amendments were not sanctioned by the order, the Lord Chancellor refused the motion with costs, S. C., MSS. Aug. 1836.

So also, where a matter has not been put in issue, with sufficient precision, the Court has, upon hearing the case, given the plaintiff liberty to amend the [*521] bill, for the purpose of *making the necessary alteration. (*l*) And so, as we have seen, the Court will sometimes at the hearing permit the prayer of the bill to be amended, so as to make it more consistent with the case made by the plaintiff than the one he has already introduced. And where a plaintiff had amended his bill, and by accident had omitted to insert in the amended bill the prayer for relief, although it was in the original bill, the Court has put off the cause in order that the plaintiff might have an opportunity to re-amend his bill by inserting it. (*m*)

Wherever improper submissions have been made in a bill on behalf of infants, the Court will, at the hearing, order that the bill shall be amended by striking out the submission. (*n*) Upon the same principle, where an infant heir-at-law had been made a co-plaintiff, Lord Redesdale ordered the cause to stand over, with liberty to the plaintiff to amend his bill, by making the heir-at-law a defendant; (*o*) and where a matter has not been put, by the bill, properly in issue, to the prejudice of the defendant, the Court has generally ordered the bill to be amended. (*p*) The Court has even gone to the extent of allowing the plaintiffs, at the hearing of an appeal, to amend their bill, by converting it from a bill into an information and bill. (*q*)

It frequently happens that, upon the argument of a demurrer, the Court, where the ground for demurring can be removed by answer, has, in order to avoid putting the plaintiff to the expense of filing a new bill, instead of deciding upon the demurrer, given the plaintiff liberty to amend his bill on payment of the costs incurred by the defendant; because, after a demurrer allowed to the whole bill, the bill is so completely out of Court that no amendment can take place. (*r*) A [*522] demurrer for want of parties, however, if allowed, is not considered *as precluding amendment for the purpose of bringing the necessary parties before the Court; and the Court, in general, annexes to the order allowing the demurrer a direction that the plaintiff shall be at liberty to amend his bill by adding parties thereto, provided they so amend within the usual period.

It is to be observed, that if after a general demurrer has been over-ruled, the defendant demurs *ore tenus*, for want of parties, and his demurrer is allowed, he will be allowed to amend by adding parties, without paying the costs of the demurrer; but if after the allowing of the demurrer *ore tenus* he takes permission to amend more extensively than by adding parties, he can only be allowed to do so on payment to the defendant of the costs of the demurrer. (*s*)

The same order will sometimes be made upon the argument of a plea, (*t*) though in general as the allowance of a plea does not, like a demurrer, necessarily put the bill out of Court, (*u*) the plaintiff may, according to the common course of the Court, obtain leave to amend his bill after the plea has been argued and allowed. (*x*)

(*l*) Lord Red. 263, cites 2 Bro. P. C. 194, *sed vide* Filkin v. Hill, 4 Bro. P. C. (Ed. Tomline) 640; *vide ante* Prayer.

(*m*) Harding v. Cox, 3 Atk. 583.

(*n*) Serle v. St. Eloy, 2 P. Wm. 386; *ante*, 102.

(*o*) Plunket v. Joice, 2 Scho. & Lef. 159; *ante* 99.

(*p*) Lord Red. 264.

(*q*) President of St. Mary Magdalen v. Sibthorp, 1 Rus. 154.

(*r*) Lord Coningsby v. Jekyll, 2 P. Wms. 300, S. C. 2 Ex. Ca. Ab. 53; Smith v. Barnes, Dick. 67, *vide etiam* Mason v. Lake, 2 Bro. P. C. 495, 497; Bresseden v. Decreets, 2 Cha. Ca. 196, *ante* 380–386; *vide* Lloyd v. Loaring, 6 Ves. 773.

(*s*) Newton v. Earl of Egmont, 4 Sim. 574. (*t*) Lord Red. 227.

(*u*) Vere v. Glynn, 2 Dick. 441.

(*x*) Lord Red. 227; this however is not matter of course, *vide Post*.

Sometimes the Court has even, upon the hearing of an interlocutory application, allowed the plaintiff to amend his bill, so as to afford him a ground for making such application. Thus, where a motion was made on the part of a plaintiff for a defendant to produce a deed, before an examiner, the possession of which by the defendant was not admitted by the answer, in consequence of no allegation having been inserted in the bill that it was in his possession, the Vice Chancellor, (Sir J. Leach) and afterwards the Lord Chancellor, upon application, gave the plaintiff leave, though the cause was at issue, to amend the bill for the purpose of obtaining that admission. (*y*)

But although the Court will sometimes, at the hearing, allow the case to stand over, with liberty for the plaintiff to amend his bill, the plaintiff ought to be careful before the cause comes on to have the record in a proper state, to enable the Court to *make a complete decree upon the point; for, as we have seen, the plaintiff himself cannot, when the cause comes [*523] on hearing, (unless under particular circumstances, or with the consent of the defendant) obtain leave to amend his bill, even upon the usual terms of paying the costs of the day; and if a decree were to be obtained upon the pleadings, which are defective in a material point, it would afterwards be liable to be set aside for error.

If after the bill has been filed, and before the defendants have appeared, the plaintiff discovers that he has made any error or omission in his bill, he may, as a matter of course, obtain permission to amend it, without payment of any costs; and if the defendants have appeared, and taken an office copy of the bill, he may in like manner have an order to amend, without costs, upon his undertaking to amend their office copies, (*z*) unless the amendments are of such a nature as to require new copies; in which case he must pay the sum of twenty shillings to each defendant or set of defendants who have taken office copies for the costs of such amendments.

In general an amendment before answer puts an end to all process of contempt which may have been issued for want of an answer; (*a*) and the Court will not allow an amendment to be made without prejudice to the process, even though the plaintiff undertakes not to require any further answer to the amendments.

It seems, however, that if a specific amendment were to be proposed, and it should appear evident that the case, so far as relates to the original defendants, would not be varied by it, an order to make such amendments would be granted without prejudice to the process; but this must be shown distinctly, otherwise the Court will not interfere. (*b*)

By Sir Edward Sugden's Act "for Altering and Amending the Law with regard to Commitments by Courts of Equity," (*c*) it is provided, that, where a defendant has been brought to the *bar of the Court for his contempt in not answering, or refuses or neglects to answer, (not being [*524] idiot, lunatic, or of unsound mind) the Court may, upon motion or petition, of which due notice shall be given personally to the defendant, authorize the plaintiff to amend his bill, without such amendment operating as a discharge of the contempt, or rendering it necessary to proceed with the process of contempt *de novo;* but after such amendment the plaintiff may proceed to take the amended bill *pro confesso* in the same manner as if it had not been amended: Provided nevertheless, that if the defendant shall be desirous to answer such amended bill, the Court shall allow him such time as shall seem just for that purpose; but if he shall not, within the time allowed, put in a sufficient answer to the

(*y*) Barnett v. Noble, 1 Jac. & W. 227. (*z*) 1 Har. 60. Ed. 1803.
(*a*) Symonds v. Duchess of Cumberland, 2 Cox, 411.
(*b*) Ibid. (*c*) 1 W. 4, c. 36, s. 15, rule 10.

amended bill, the process for taking the bill *pro confesso* may be resumed and carried on. (*d*)

Where the defendant has put in a demurrer or a plea, the plaintiff may if he please obtain leave to amend his bill; and where no order has been obtained to set the plea or demurrer down for argument, such leave is given, as a matter of course, on condition only of the plaintiff's paying to the defendant twenty shillings costs; (*e*) but after the order for setting it down for argument the Court requires that it should be upon payment of five pounds for the costs of the plea or demurrer, in addition to the twenty shillings costs for the amendment. (*f*)

It has been held, that an order to amend, upon putting in a plea or demurrer, on payment of twenty shillings costs, ought to state that the plea or demurrer has not been set down. (*g*) And where, after a plea had been set down, the plaintiff obtained the ordinary order to amend upon payment of twenty shillings costs only, upon the plea coming on in the paper for argument, Lord Thurlow was of opinion that the order so obtained did not strike the plea out of the paper; and that the defendant was at liberty to go on and argue the plea, and [*525] get *his costs; and upon this ground, the plaintiff not appearing, his Lordship allowed the plea, with costs. (*h*)

Where after a plea set down the plaintiff obtained an order to amend his bill, on payment of twenty shillings costs, the Court, upon motion, refused to discharge the order for irregularity, but directed that it should stand, upon the plaintiff's paying to the defendant twenty shillings costs for the amendment, and five pounds for setting down the plea. (*i*) And so where a plea had been set down for argument, and when it came on to be heard, the plaintiff declined arguing it, but applied for leave to amend his bill, the plea was allowed, on payment of five pounds costs, and leave given to amend upon the usual terms. (*k*)

It has been before stated, upon the authority of the Treatise on Pleadings, (*l*) that liberty to amend a bill, after allowance of a plea, may be obtained according to the common practice of the Court; but it must not be understood from this that the granting of such liberty to amend is by any means a matter of course, even where the plea covers only part of the bill. This was decided in *Taylor* v. *Shaw*, (*m*) where a motion to amend after plea allowed was made, as of course, but the registrar having refused to draw up the order, the plaintiff moved, upon a general notice, (supported by an affidavit, stating that the settled account was erroneous, and generally that he could introduce divers charges whereby he could falsify and displace the alleged stated account) but Sir J. Leach, V. C., required that the plaintiff should serve a new notice of motion, in which he should state the particulars of the amendments he proposed to introduce into the bill; (*n*) and upon that being done, his Honor dismissed the motion, with costs, because the proposed amendments went no further than, either to show that, in fact, the plea was not true, or that if it were true the [*526] plaintiff ought to be permitted to surcharge and falsify it; and his Honor was of opinion *that if the plaintiff meant to disprove the plea he must go to issue upon it; and it would be useless to permit him to introduce new matter to that effect in his bill, because the plea protected the defendant from answering it; and if the plaintiff meant to make a new case,

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(*d*) By the 4 & 5 W. 4, c. 16, rule 7, this provision has been extended to the Court of Chancery in Ireland.

(*e*) 1 Har. 61; Parker v. Aloch, 1 Y. & J. 194.

(*f*) 1 Har. 61, 1808.

(*g*) Jennings v. Pearce, 1 Ves. J. 448.

(*h*) Jennings v. Pearce, 1 Ves. J. 448.

(*i*) Vernon v. Cue, 1 Dick, 358.

(*k*) Lopez v. De Tastet, 3 Mad. 183.

(*l*) *Ante* 522. Ld. Red. 227.

(*m*) 2 S. & S. 12.

(*n*) Ibid.

which would avoid the effect of the plea, and be consistent with it, he ought to have moved for leave to amend before the argument of the plea, and it was then too late to do so.

It may be observed in this place, that where a plea for want of parties was put in to a bill of discovery, which had been filed in aid of an ejectment at law, on the ground that the trustees in whom the legal estate was vested were not co-plaintiffs with the *cestui que trusts*, and upon argument a case was sent for the opinion of a court of law, but the parties not being able to agree upon the case, the bill was amended by adding the trustees as co-plaintiffs, Lord Eldon discharged the order to amend for irregularity, as having been obtained while the judgment on the plea was pending. (*o*) Afterwards, however, upon the plaintiffs moving that the Vice Chancellor's order directing the case to be stated might be discharged, and that the plaintiff might be at liberty to amend this bill by the introduction of facts to show that the legal estate was in the trustees, and that there was a count in the declaration in ejectment on the demise of such trustees, the Lord Chancellor made such an order, but upon condition of the plaintiffs consenting to the plea being allowed. (*p*)

It seems that, where a plea has been replied to, the plaintiff may in some cases have leave to withdraw his replication and amend, but that such leave is not a matter of course, and can only be obtained on a special motion; (*q*) and therefore where an order to withdraw replication to a plea, and amend, was obtained as a motion of course, it was discharged for irregularity, and the amended bill taken off the file. (*r*)

It is to be observed that if a plaintiff who has obtained an injunction for want of an answer amends his bill, before *an opportunity [*527] has been afforded of discussing the propriety of the injunction upon the merits of the case, he will loose the benefit of the injunction. Upon this point great difference of opinion appears, formerly, to have been entertained; (*s*) but it is now well understood that an injunction drops of course, upon the plaintiffs amending the bill. (*t*)

Sometimes, however, the Court will, upon special application before the merits have been discussed, give the plaintiff liberty to amend his bill, *without prejudice to the injunction.* Thus, in *Vesey* v. *Wilks*, (*v*) where after a special injunction had been granted upon affidavit, before answer, against one of two defendants, who afterwards put in their answers, an application was made by the plaintiff for leave to amend his bill without prejudice to the injunction, and granted. But it is to be observed that the proposed amendments were stated in the affidavit, which also stated that the facts which rendered the amendment necessary were detailed in the answer of the defendant, against whom the injunction had not been granted, and were a surprise upon the plaintiff, and had not been contemplated or foreseen by him when he gave instructions for the original bill. The affidavit further stated that he required no further answer from the defendant against whom the injunction had been awarded, and that the amendments proposed had no relation whatever to the merits of the case upon which the injunction had been granted.

The Court has also gone to the extent, under particular circumstances, of permitting a re-amendment of the bill, without prejudice to the injunction, in cases where the merits of the case have not been brought under the consideration

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(*o*) Ld. Cholmondeley v. Clinton, 2 Mer. 71 (*p*) Ibib 74.
(*q*) Carleton v. L'Estrange, 1 Turner & R. 23.
(*r*) Ibid.
(*s*) *Vide* Mason v. Murray, 2 Dick. 536; Lord Delvin v. Smith, Moseley, 204, and Eden on Injunctions, 120.
(*t*) Bliss v. Boscawen, 2 V. & B. 102. (*v*) 3 Mad. 475.

of the Court. In such cases, however, the Court requires it to be clearly shown by affidavit that the plaintiff had no knowledge of the facts proposed to be stated in the amendment, so as to have been able to bring them sooner upon the record.

[*528] The doctrine upon which the practice of requiring an affidavit *in cases of this nature is thus stated in a recent case by Lord Eldon: (u) "The principle of requiring the case for the injunction to be put upon the record immediately is, that the party, the prosecution of whose demand at law is to be delayed by the injunction, shall be delayed as short a time as can be consistent with justice; but that principle is not contraverted where a plaintiff is not informed that an equity exists, which would entitle him to relief; no blame can attach upon him for not putting it upon the record until he knows it; but as soon as he knows it he must put it on the record. In the case cited, (x) I think the information was obtained not from the record, but *aliunde:* it is not material for this purpose how the plaintiff procures the information, even though unduly obtained; but if he gets it from the answer, the Court must know, from the bill and answer, that he cannot have as much benefit as if he had asked farther questions. In that case, therefore, the Court required to know what were the proposed amendments; whether they were material, and if material, to have ascertained by clear and positive affidavit that they related to facts of which the plaintiff had not a knowledge, enabling him to bring that case upon the record sooner. All these facts must be substantiated."

There is one case, however, in which the Court will permit the amendments of a bill without prejudice to an injunction already obtained, where the injunction has not been supported upon merits or any affidavit, without requiring or calling for a specification of the amendments to be made, and that is where the defendant has put in an answer, which has been reported insufficient upon the argument of exceptions; in such case the Court will, as a matter of course, give the plaintiff leave to amend his bill without prejudice to the injunction, and require the defendants to answer the amendments and exceptions at the same time.

An order to this effect may be obtained upon motion or petition, without notice, as soon as the Master's report upon the exceptions has been filed, and

[*529] an amendment of the bill *under its authority will not prejudice the injunction, (y) even though the order should not express it to be "*without prejudice*, &c." (z) It is to be observed, that an order of this nature will prevent the defendant from taking exceptions to the Master's report upon the sufficiency of the answer, provided it be served before the exceptions are set down, and that the mere filing of the exceptions will be of no avail, unless the order for setting them down is actually made and served before service of the order for leave to amend, &c. (a) And so where a bill has been already amended under such an order, and exceptions are taken to the answer to the amended bill, and are allowed, the plaintiff may have a further order to amend and that the defendant may answer the amendment and exception at the same time; and such order may be obtained, *ex parte*, without previous notice. (b)

An order of this nature may also be obtained where a defendant, after exceptions taken, submits to answer them, (c) and in either case the Court permits the amendment to be made without costs.

(u) Sharp v. Ashton, 3 V. & B. 148. (x) Mair v. Thellusson, ibid. *notis.*
(y) Mayne v. Hochin, 1 Dick. 255.
(z) Adney v. Flood, 1 Mad. 449; Dipper v. Durant, 3 Mer. 465.
(a) Farquharson v. Balfour, Jac. 587.
(b) Mendizabel v. Hullett, 1 Russ. & M. 324; Bird v. Hustler, ib. 325.
(c) 1 Har. 62, Ed. 1808.

Where the defendant does not submit to the exceptions, and they are allowed upon argument, the plaintiff must wait till the report upon the exceptions has been filed before he procures the order to amend, &c., otherwise his order may be discharged for irregularity. (*d*) It requires, however, the exercise of some diligence on the part of the plaintiff's solicitor to obtain and serve this order in sufficient time to render it available, for if the defendant, even after the motion has been made, contrives to put in an answer to the exceptions before the order has been drawn up and served, it will be regular; (*e*) and the defendant may, upon the coming in of his further *answer, move to dissolve the injunction, which must in such case stand or fall by the original bill, and [*530] the answers thereto. (*f*) And where exceptions were taken to an answer to an injunction bill, and allowed, and the defendant put in a further answer before the plaintiff obtained the order to amend, (which however he obtained and served on the same day,) Sir Thomas Clarke, M. R., upon motion, held that part of the order, which directed the defendant to answer the amendments and exceptions at the same time, to be wrong, and discharged it. (*g*)

In this respect there is a difference between the practice of the Court of Exchequer and that of the Court of Chancery. In the Exchequer a further answer cannot be put in after exceptions have been taken, and the tender of the further answer is considered as a submission to the exceptions; and where an injunction has not been already granted, it may, after such a tender, be moved for of course. (*h*)

It is to be observed that where a plaintiff has duly obtained and served an order to amend and that the defendant may answer the amendment and exceptions at the same time, the original and amended bill become one record, and the defendant must fully answer both before he can move to dissolve the injunction. (*i*)

Although the amendment of a bill, after exceptions for insufficiency have been allowed, will not prejudice an injunction already obtained, the plaintiff cannot, pending his exceptions, obtain an order for leave to amend; because by the exceptions the defendant is deprived of moving on his answer to dissolve the injunction, and the plaintiff would, therefore, indirectly give himself an opportunity of amending without prejudice to the injunction, which he ought not to have without special order. In *Dixon* v. *Redmond*, (*k*) it is said that an order to amend so obtained, pending exceptions, is irregular, but in *De la Torre* v. *Bernales*, (*l*) it *is laid down that if a plaintiff under such an order [*531] amends his bill before the exceptions have been allowed, he will be considered as having waived them. Where, therefore, a plaintiff, after taking exceptions to the answer, is desirous of amending his bill, without prejudice to the exceptions previously taken, there should be a special motion to that effect; (*m*) unless indeed the amendment consists in merely adding a defendant, and requires no further answer, which Lord Eldon considered as an excepted case.

It seems that as a plaintiff cannot, unless by special leave of the Court, make material amendments in his bill without waiving the exceptions which he may have taken to the answer, so he cannot, in general, after he has amended his bill, take exceptions to the answer to the original bill without the special order

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(*d*) Dixon v. Redmond, 2 Sch. & Lef. 515; Rushton v. Tronghton, 2 Sim. 33; Job v. Barker, 2 Swan. 255.

(*e*) Bethuen v. Bateman, 1 Dick. 296; Knox v. Symmonds, 1 Ves. J. 87; Paty v. Simpson, 2 Cox, 392; Partridge v. Haycraft, 11 Ves. 570–578.

(*f*) Mayne v. Hochin, 1 Dick. 255.

(*g*) Bethuen v. Bateman, 1 Dick. 296.

(*h*) Edwards v. Johnson, 1 Price, 203.

(*i*) Mayne v. Hochin, *ubi supra*.

(*k*) 2. Sch. & Lef. 515.

(*l*) 4 Mad. 396.

(*m*) De la Torre v. Bernales, 4 Mad. 396.

of the Court; and for this reason, where, after a bill had been filed and answers put in, the plaintiff wanted to obtain an injunction to restrain the sale of an estate, he moved the Court specially that he might be at liberty to amend his bill by praying an injunction, without prejudice to his taking exceptions to the answer, and the Court, in making the order, confined the amendment, specifically, to an alteration in the prayer of the bill, and to the single object of the injunction. (*n*)

Although the rule is inflexible, that if a plaintiff, who has obtained an injunction for want of an answer, amends his bill, he will lose the benefit of his injunction, unless the order, by which the amendment is sanctioned, expressly declares that it is to be without prejudice to the injunction, or has been obtained upon the allowance of exceptions; (*o*) yet the rule is only to be understood as applying to cases where the injunction is a mere injunction to stay proceedings at law, and has been obtained in consequence of the defendant's default in not appearing or answering. Where an injunction has originally been granted upon affidavit of merits, (*p*) a motion to amend, without prejudice to the injunction, may be obtained in the Court of Chancery as a matter of course, unless the bill [*532] has *been already amended; in which case the Court will not make an order to sanction a re-amendment unless notice is given and the proposed amendments stated, and unless the Court is satisfied, upon affidavits, that the amendments relate to facts of which the plaintiff had no knowledge to enable him to bring them sooner before the Court. (*q*)

It is to be observed that, after a defendant has put in an answer to an injunction bill, the plaintiff, unless he has successfully accepted to the answer, cannot obtain an order to amend, without prejudice to the injunction, till the injunction has been discussed upon the merits; and that in *Turner* v. *Bazely*, (*r*) where a motion to this effect was made, after the answer had come in, and before any exceptions had been taken, or order *nisi* obtained to dissolve, Lord Eldon said that the plaintiff was in that stage which entitled him to maintain the injunction by showing exceptions for cause or showing merits, but he was not entitled to amend. The same principle was afterwards acted upon by Sir J. Leach, in *Penfold* v. *Stoveld*. (*s*)

It may be observed here, that the Masters do not consider themselves authorized by the 3 & 4 W. 4, c. 94, s. 13, to make orders for leave to amend *without prejudice*, and that applications for such orders must be made to the Court.

Although much difference of opinion appears formerly to have existed upon the subject, (*t*) it has now been repeatedly and clearly decided that, where an injunction has been dissolved upon the answer coming in, either upon merits, or for want of cause shown, the plaintiff cannot, by amending his bill, or filing a supplemental bill with new matter, (which is part of the old cause) apply *as of course* for a new injunction to stay proceedings until answer or further order; on the ground that, according to the course of the Court, the plaintiff ought to state his case, as to the merits of his equity, on the filing of the original bill, the Court not giving him liberty to split and retail out his equity and to apply upon

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(*n*) Jacob v. Hall, 12 Ves. 458.

(*o*) Bliss v. Boscawen, 2 V. & B. 101, 102.

(*p*) Pratt v. Archer, 1 S. & S. 433. The report of which case appears to be erroneous in stating that the common injunction had been granted, when the fact was that it was a special injunction granted on affidavit. Pickering v. Hanson, 2 Sim. 488; *vide etiam* King v. Turner, Mad. & Geld. 255. In the Exchequer the plaintiff is required, even after injunction upon merits, to specify the nature of the amendment, Bell v. Brockbank, 2 Y. & J. 181.

(*q*) Sharp v. Ashton, 3 V. & B. 144; Mair v. Thelluson, ib. *notis*.

(*r*) 2 V. & B. 330. (*s*) Mad. 471.

(*t*) Eden on Injunction, 124.

another head for another *injunction after the former one is dissolved. (u) This doctrine has been followed in all the modern [*533] cases, and it is now distinctly settled that where an injunction has been once dissolved it cannot be revived but upon special motion. (v)

It is to be observed, that in *Nethorpe* v. *Law*, (x) it was held, that where an original bill had been filed, to which an answer was put in, but no injunction had been obtained, the plaintiff might, upon amending his bill, have the common injunction for want of answer. In the subsequent case of *Bliss* v. *Boscawen*, (y) however, Lord Eldon is reported to have declared, that he would not extend the principle of that case, to permit a plaintiff, who had applied for an injunction upon the merits confessed in the answer to the original bill, but had been refused, to have an injunction for want of an answer to his amended bill. His Lordship observed, "the proposition is absurd that the Court holds a plaintiff so strictly to the rule that he shall put his best case forward at first, as not to permit him to amend without losing the injunction, unless expressly saved in that order of amendment, yet if in discussing the merits of the case the Court thinks him not entitled to an injunction, he shall obtain it by amending, not communicating to the Court why he did not make the case for it at first."

It appears to have been the opinion of Lord Thurlow, in *Edwards* v. *Jenkins*, (a) that, although after an injunction has been dissolved, the plaintiff, upon amending his bill, cannot have an injunction till answer and further order, on a motion of course; yet he might, if the amendments were *sufficient [*534] to raise an equity, obtain such an injunction on special motion, *without any affidavit in support of the amendment or equity of the bill:* the Court deciding, on special motion on the amended bill, what it does of course on the original bill. This doctrine, however, has been over-ruled by Lord Eldon, in *James* v. *Downes*, (b) in which case two questions appear to have arisen: first, whether after an amendment an injunction can be issued at all *until default*, either in appearing or answering; and secondly, whether it can be so issued without special motion, and affidavits verifying the amendments. Upon that occasion Lord Eldon stated the practice of the Court upon these points: "Upon an original bill the plaintiff cannot have an injunction until some default by the defendant, either by not appearing or by not answering; the time in either instance having expired. When this motion was first made, I had no recollection of the case that I now find determined by Lord Thurlow; that, if after an injunction dissolved upon the answer to the original bill the plaintiff amends, by that amendment infusing into the record an equity, supposing the allegations true, sufficient as the foundation of an injunction, he may apply: but he cannot, I apprehend, until default by the defendant; and then he does not move for the injunction upon the amended bill by reason merely of that default, but taking that as one ground, he moves for the injunction, verifying the

(u) Travers v. Lord Stafford, 2 Ves. 19, S. C. Amb. 104.

(v) Anon. 3 Atk. 694; Lady Markham v. Dickenson, 1 Ves. Jun. 30; Norris v. Kennedy, 11 Ves. 565; James v. Downes, 18 Ves. 522; Bliss v. Boscawen, 2 V. & B. 101; Vipan v. Mortlock, 2 Mer. 479.

(x) 13 Ves. 233.

(y) *Ubi supra.* A singular error with regard to the determination in Nelthorpe v. Law, is noticed, by the noble and learned author of the Treatise on the Law of Injunctions, to have crept into the report of this case; in which Lord Eldon is represented as saying, "I made the order with reluctance, but was bound by *the practice;*" which, however, must have been a mistake, either on the part of his Lordship or of the reporter, as, according to the date, the case was decided almost two months before Lord Erskine quitted the Seals. Eden on Injunction, 129.

(a) 3 Bro. C. C. 425; 2 Dick. 755, S. C.

(b) 18. Ves. 523.

truth of the amended bill by affidavit; and then, if there is both default by the defendant, and an equitable case proved by the affidavit of the plaintiff, the Court giving credit to the bill in the first instance, if there is also a default by the defendant, in the latter does not give credit to the bill, as the second proceeding, unless, besides the default, the bill is also verified by affidavit: but until some default the plaintiff cannot be entitled to the injunction: for instance, unless the time for answering has expired without an answer no verification of the bill will do. If Lord Thurlow meant to lay down, that, though there was no default by the defendant, the mere verification of the amended bill was sufficient; with all deference I do not *agree to that." (c) This doctrine [*535] was acted upon in *Lee* v. *Ravenscroft*, (d) where an application, supported by affidavits, was made for a renewed injunction upon an amended bill after appearance, but before the time for answering required by the new orders (e) was expired, and refused by the Vice Chancellor, who stated that previously to his decision he had consulted with the Lord Chancellor upon the subject, who concurred with him in his opinion.

The consequence of this decision is, that where, after an injunction has been obtained upon an original bill and dissolved, the plaintiff amends his bill, he cannot after appearance obtain an injunction upon the amended bill, even upon affidavits filed, until the expiration, after appearance, of five weeks in a town cause, and seven weeks in a country cause, which is the time allowed by the above-mentioned order for putting in an answer to an amended bill.

What effect the amendment of the bill would have upon a *ne exeat regno* does not appear to have been decided. In *Grant* v. *Grant*, (f) however, Sir John Leach, upon a special motion being made before him for leave to amend a bill without prejudice to the *ne exeat*, refused to entertain the motion, although it was supported by an affidavit in which the amendments were stated, and notice had been served upon the bail as well as upon the defendant; his Honor observing, that he had an unqualified aversion to the writ of *ne exeat regno*, but should abstain from expressing any opinion that might prejudice the question; and that the plaintiff's counsel, if they were satisfied with the analogy which had been pointed out to the practice at law, might take an order to amend without the special reservation, or might abandon their motion, but that in either case they must pay the costs.

Previously to the publication of Lord Lyndhurst's orders of the 3d April, 1828, the plaintiff had an unlimited power of amending his bill, but both before [*536] and after answer, as often *as he found it convenient to do so. This power was considered, by the Commissioners of Inquiry into the Practice of the Court, as too extensive; and, in pursuance of their recommendation, the thirteenth order was framed; by which it was provided that the plaintiff should be at liberty, before filing a replication, to obtain one order only for leave to amend, but that no further leave to amend should be granted before replication, unless the Court should be satisfied, by affidavit to be made as therein mentioned, that the draft of the intended amendments had been settled, approved and signed by counsel, and that such amendments were not intended to be made for the purpose of delay or vexation, but because the same were material to the case of the plaintiff. (g)

(c) It seems that where an injunction has been obtained, after amendment upon affidavit, before answer, the defendant will be allowed to move before answer to dissolve it, upon affidavit in reply to that upon which the injunction has been so granted. Vipan v. Mortlock, 2 Mer. 476.

(d) 6 Sim. 474.

(e) Ord. 21, Dec. 1833; Ord. 10.

(f) 2 Sim. 14.

(g) 2 Russ. App. 8.

Under this order, it was held by Lord Lyndhurst, in *Tarleton* v. *Dyer*, (*h*) that the plaintiff was entitled to one order to amend only, whether obtained before or after answer; and that a second order obtained, as of course before answer, was irregular. It appears that afterwards, in *Langdon* v. *Langdon*, (*i*) his Lordship seemed inclined to recede from his judgment in the above case, though the question was never finally disposed of, and subsequent decisions were made, as well by Lord Lyndhurst as by his successor and the Vice Chancellor, (*k*) from which it may clearly be inferred that it was the opinion of those learned judges that the thirteenth order did not apply to amendments made before any answer was put in; and the decision of Lord Lyndhurst upon the first point, in *Tarleton* v. *Dyer*, was considered to be virtually over-ruled. The question has, however, been completely set at rest by the revised edition of the orders promulgated 23d November, 1831, (*l*) in which the operation of the order has been restricted to amendments required "*after the answer had been filed.*"

The order, as thus amended, is in the following words:—"*That after an answer has been filed*, (*m*) the plaintiff shall *be at liberty, [*537] before filing a replication, to obtain, upon motion or petition without notice, one order for leave to amend the bill; but no further leave to amend shall be granted after an answer, and before replication, unless the Court shall be satisfied by affidavit that the draft of the intended amendments has been settled, approved, and signed by counsel, and that such amendments are not intended to be made for the purpose of delay or vexation, but because the same are considered to be material to the case of the plaintiff; such affidavit to be made by the plaintiff, or one of the plaintiffs, where there is more than one, *and* (*n*) his, her, or their solicitor, or by such solicitor alone, in case the plaintiff or plaintiffs, from being abroad or otherwise, shall be unable to join therein; but no order to amend shall be made after answer and before replication, either without notice, or upon affidavit in manner hereinbefore-mentioned, unless such order be obtained within six weeks after the answer, if there be only one defendant, or after the last of the answers if there be two or more defendants, is to be deemed sufficient. *But this order shall not extend to amendments, which are made only for the purpose of rectifying some clerical error, or error in names, dates or sums; in which cases the order to amend may be obtained upon motion or petition, without notice.*"

As the thirteenth order now stands, it is clear that a plaintiff, until answer, has the same right that he had before, to amend his bill as often as he pleases; but, after answer, his right of amendment is restricted to once only, unless upon the terms specified in the order; except in cases where the amendments are to be made merely for the purpose of rectifying clerical errors, or errors in names, dates or sums, in which cases orders to amend may still be obtained in the usual way.

With reference to this subject, it may be noticed, that as an insufficient answer is not considered as an answer, an order to amend, obtained after exceptions for insufficiency allowed or *submitted to, will not be con- [*538] sidered as the one order to amend, which, by the terms of the thir-

(*h*) 1 R. & M. 1.
(*i*) Cited argument in Bird v. Hustler, 1 R. & M. 326.
(*k*) *Vide* note to Bird v. Hustler, 1 R. & M. 329.
(*l*) 1 R. & M. 769.
(*m*) The words in italics have been introduced in the amended order, and were not in the original.
(*n*) As this order was originally promulgated, the word *or* occured in this place instead of *and*, as at present; but it had been construed to mean *and*, and the affidavit was required to be made both by the plaintiff and his solicitor. Browne v. Dunn, 3 Sim. 23.

teenth order, the plaintiff is entitled to have after answer. (*o*) And, for the same reason, it has been held, that the amendment of a bill, by adding parties after a demurrer allowed, will not preclude a plaintiff from amending, as of course, after the answer has come in. (*p*)

It may be noticed, with reference to the thirteenth order, that it has been held not to extend to amendments required in consequence of the answer of a defendant, who has been added by amendment after the original defendants have answered; and that (since the 3 & 4 Will. 4, c. 34) a motion was made before the Vice Chancellor that a plaintiff might be at liberty to amend a bill, which had already been amended after answer, by the introduction of a new defendant, by the statement of matter, which the answer of the new defendant rendered necessary; and that the Vice Chancellor said that the amended bill must be considered as an original one, with respect to the new defendant, and that the case was within the spirit of the thirteenth order: and the motion was accordingly granted, upon the plaintiff undertaking not to serve the original defendant with a subpœna to answer the amendments. (*q*)

It has been held also, that the word "answer," in the thirteenth order, refers to an answer to an amended bill, as well as to an answer to an original bill; and that therefore, where a bill has been amended in such a manner as to call for an answer (even though it has been upon special leave, after replication filed and withdrawn,) the plaintiff may, at any time before the answer to the amended bill has come in, have a further order to amend. (*r*)

By the terms of the thirteenth order, the time within which an order to amend must be obtained is limited to six weeks after the answer of the defendant, if there be only one, or if more than one, of the last of the defendants shall be deemed sufficient. (unless in cases of orders for amendments to rectify [*539] *clerical errors, &c., which it seems may still be obtained at any time, upon motion or petition of course.) Under this portion of the order, therefore, it has been held, that the defendant has six weeks, beyond the two months mentioned in the fourth order, (*s*) as the period before the expiration of which the plaintiff must deliver exceptions to the answer, within which he may procure an order to amend. And it seems that a plaintiff may apply to amend his bill at any time before the six weeks, after the answer of the last defendant shall be deemed sufficient, shall have expired. (*t*)

It is to be observed that the six weeks, mentioned in the thirteenth order, run from the time when the answer of the last of the defendants might be deemed sufficient; but it has been held that a defendant, who is alleged to be out of the jurisdiction, is not a defendant within the meaning of the order; and upon this ground an order for leave to amend, obtained after more than six weeks had elapsed from the time when the answers of all the other defendants, though before any answer had been put in by the defendant alleged to be abroad, was discharged for irregularity. (*u*)

In computing the time, which is allowed by the thirteenth order for amending a bill, &c., or for filing, delivering or referring exceptions, the time which occurs between the last seal after Trinity term and the first seal before Michaelmas term, and the first seal before Hilary term is not to be reckoned. (*x*) The consequence of this rule is, that if the answer to a bill be filed on the 30th of

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(*o*) Bird v. Hustler, 1 R. & M. 325.
(*p*) Pesheller v. Hammett, 3 Sim. 389.
(*q*) Evans v. Hughes, 5 Sim. 666.
(*r*) Wharton v. Swann, 2 M. & K. 363.
(*s*) 2 Russ. App. 6.
(*t*) Swinfen v. Swinfen, 3 Sim. 384.
(*u*) King of Spain v. Hullett, 1 Russ. & M. 7. n.
(*x*) 19 Ord. of 1828, amended 23 Nov. 1831. It is to be observed, that the general rule with respect to all these orders, as to time, is that one day is to be included, and the other excluded. *Per* Sir C. Pepys, M. R.; Angell v. Wescombe, 1; Mylne v. Craig, 50.—

November, the plaintiff will have till the 25th of January ensuing to except to the answer; and if no exceptions are filed, he would, supposing no vacation to intervene, have six weeks more to amend *his bill under the thirteenth order. It generally happens, however, that between the [*540] last seal after Michaelmas term and the first seal of Hilary term, there is a vacation of almost three weeks, which three weeks, according to the provisions of the nineteenth order, must be added to the six weeks occurring after the 28th of January, thereby extending the whole time allowed to the plaintiff for procuring an order to amend, after the expiration of the two months, to nine weeks.

Some inconvenience was occasioned by the operation of this order, in consequence of the sixteenth order, (*y*) by which power is given to the defendant, after the expiration of two months from time when his answer is to be deemed sufficient, to move, upon notice, that the bill shall be dismissed for want of prosecution, without any allowance being made for an intervening vacation; so that in the case above put (although by the effect of the thirteenth order the plaintiff would have nine weeks after the answer was sufficient, within which he might move to amend,) the defendant might, at the expiration of eight weeks from the same period, move to dismiss his bill. This actually occurred in *Swinfen* v. *Swinfen*, (*z*) in which the Vice Chancellor made the order to dismiss the plaintiff's bill, although his time for amending had not expired, and he had actually within that time obtained an order to amend; but the inconvenience has since been obviated by the twenty-sixth order of the 21st December, 1833, by which it is ordered that a defendant shall not be at liberty to serve a notice of motion to dismiss for want of prosecution, until after the time limited by the rules of the Court within which a plaintiff may obtain an order to amend as to such defendant shall have expired, anything in any former order contained to the contrary notwithstanding.

It was stated by Sir L. Shadwell, V. C., in *Gully* v. *Vanboädicoate*, (*a*) that the last-mentioned order was made merely to prevent a motion to dismiss being made, when the time for amending had not expired, *as against the defendants moving to dismiss*, and he therefore allowed a defendant, upon motion, to *dismiss the plaintiff's bill as to himself, after the expiration of two [*541] months from the time when his answer was to be deemed sufficient, although from the answer of the other defendants not being filed, the time for amending the bill had not expired.

It is to be observed, that if a plaintiff, having obtained an order to amend does not get the order drawn up and served before the defendant moves to dismiss, the order to amend will be considered a nullity, and cannot prevent the dismissal of the bill. (*b*)

The order to amend will, however, be in time, if it be drawn up and served before the motion to dismiss is actually made, although it be after notice of the motion has been served. (*c*) If a plaintiff, having obtained an order to amend, does not amend within the time limited for that purpose by the order, such order becomes void, and the cause, as far as relates to any motion to dismiss the bill for want of prosecution, stands in the same situation as if such order had not been made. (*d*) And it has been held, that where a plaintiff, having obtained an order to amend, amends his bill, but omits to serve the defendant with a sub-

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Where there is no seal before the term, the time expires on the first day of term; and if it expires on a Sunday, the time is extended throughout the Monday following, ib. *Videetiam*, Milburn v. Lyster, 5 Sim. 565; Manners v. Bryan, ibid. 147, 1 M. & K. 453, S. C.

(*y*) 3 April, 1828, amended 23d Nov. 1831.

(*z*) 3 Sim. 384.

(*a*) 5 Sim. 668.

(*b*) *Anon.* 7 Ves. 222; Morris v. Owen, 1 V. & B. 523.

(*c*) Peacock v. Sievier, 5 Sim. 553.

(*d*) Ord. 14, 3 Ap. 1828.

pœna to answer the amended bill, such a proceeding will not preclude the defendant from moving to dismiss under the sixteenth order. (*e*)

It should also be observed, that an order to amend, obtained in violation of the thirteenth order, is considered as a mere nullity; and that, although it remains undischarged, it will be no answer to a motion to dismiss for want of prosecution under the sixteenth order. (*f*) It has been held, however, that the acceptance of costs under such an order will waive the irregularity, whether such acceptance be by the defendant's solicitor or by his clerk in Court. (*g*) And in the *King of Spain* v. *Hullett*, (*h*) where the Court had set aside an order to amend, on the ground of irregularity, the order by which the order to amend [*542] was set aside was discharged, on the motion of the plaintiff, on the *ground that the defendant had accepted the costs of the order to amend, but which ground had not been insisted upon at the hearing of the motion. It is to be observed that, in that case, the order to discharge the motion to amend had not been drawn up and served before the application of the plaintiff to discharge it was made, and that the plaintiff was ordered to pay the defendant's costs of the application. (*i*) It seems also, that where an order to amend has been irregularly obtained, if the defendant, after the bill has been amended, applies to have his office-copy altered pursuant to the amendment, such application will be a waiver of the irregularity. (*k*)

Formerly all orders to amend were granted upon application either to the Lord Chancellor or Vice Chancellor upon motion, or to the Master of the Rolls upon petition; but now by 3 & 4 Will. 4, c. 94, s. 13, the masters in ordinary of the Court are to hear and determine all applications for time to plead, answer or demur, and *for leave to amend bills*, and for enlarging publication, and all such other matters relating to the conduct of the suits in the Court as the Lord Chancellor, with the advice and assistance of the Master of the Rolls and Vice Chancellor, or one of them, shall, by any general order or orders, direct, in such manner and under such rules and regulations as by any general order or orders to be also issued by the Lord Chancellor, with the advice and assistance aforesaid, shall be directed, with a power however of appeal from the order made on such application to the Lord Chancellor, Master of the Rolls or Vice Chancellor, whose order made upon such appeal is to be final and conclusive: and by the fourteenth section of the above Act, it is enacted that no such application as above mentioned shall in future be heard by any of the judges of the Court of Chancery, except on appeal as thereinbefore provided. Soon after the passing of the above Act, a doubt was suggested to the Court as to whether it extended to all cases where leave was required to amend, or only to those in which a special application was required by the orders and practice of the Court; [*543] and in **Cullingworth* v. *Grundy*, (*m*) the Lord Chancellor, (Lord Brougham) after conferring with the other judges of the Court (Sir John Leach, M. R., and Sir L. Shadwell, V. C.) expressed an opinion that the above clause was confined to special applications, and did not take away the jurisdiction of the judges of the Court to make orders upon motions of course.

(*e*) Bramston v. Carter, 2 Sim. 458; *vide etiam*, Cooke v. Davies, 1 Fan. & R. 309; 1 Russ. 153, n. S. C.

(*f*) De Geneve v. Hannam, 1 R. & M. 494.

(*g*) Tarleton v. Dyer, 1 R. & M. 1. (*h*) 1 R. & M. 7, n.

(*i*) Ibid.

(*k*) Kendall v. Beckett, 1 Russ. 152; *vide etiam*, Bramston v. Carter, *ubi supra*.

(*m*) 2 M. & K. 359.

In consequence of this determination, all applications for leave to amend, which are of course, and require no notice, must be made either to the Lord Chancellor, the Vice Chancellor, or to the Master of the Rolls; (n) but all special applications for the same purpose must be made, in the first instance, to the Master in rotation, to be ascertained in the manner pointed out by the seventeenth order of the 21 December, 1833. (o)

The Act, however, does not authorize the Masters to hear and determine applications for leave to amend, coupled with any additional matter: therefore, application for leave to amend, *without prejudice to an injunction*, &c. must be made to the Court. (p)

By the 20th of the last-mentioned orders, it is directed that all such applications as are therein mentioned, *and all other special applications under the said Act*, shall be made by taking out a warrant, at the foot whereof a notice shall be written, specifying the object of the application; and the same shall be served two clear days before the return thereof.

The 23d order regulates the manner in which the costs of applications to the Master for special orders shall be provided for, and directs that "the Masters shall, on all applications to them, by warrant under the Act or under the above-mentioned orders, be at liberty to direct, and shall, accordingly, *in the orders made thereon, order and direct whether the costs of the [*544] application shall be costs in the cause, or whether such costs, or any part thereof, shall be paid by any of the parties personally; and in the latter case the said Masters respectively shall in all such orders either fix the sum to be paid for such costs, or tax the same at their discretion; and the party to whom such costs are directed to be paid shall be entitled to sue out a *subpœna* for the same."

The form and mode of entering special orders, to be made by the Masters under the above Act and orders, are pointed out in the twenty-fourth order; (r) and it is provided that such orders, when entered in the manner therein prescribed, shall be binding, unless rescinded or varied on appeal, and shall be enforced in like manner as if made by the Court.

The amendments hitherto noticed are such, only, as can be made before the cause is at issue. A plaintiff's opportunities of amending his case are not, however, confined to this period, but he may, after replication has been filed and the cause is at issue, have leave to amend his bill, and this even after witnesses have been examined in the cause, and publication passed.

If the plaintiff has occasion to amend his bill after replication, merely by adding parties, he may obtain leave to do so, as a matter of course; and upon this principle liberty was given to a plaintiff to amend after replication, by charging that one of the defendants, already before the Court, was the administrator of an individual whose personal representative would have been a neces-

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(n) Although the 3 & 4 Will. 4, c. 94, s. 24, gives to the Master of the Rolls the same power of hearing motions, pleas and demurrers as that possessed by the Lord Chancellor, it does not take away from him the power of making orders upon petition, in matters which in the other branch of the Court are usually made upon motion, consequently orders of this nature still continue to be made at the Rolls upon petition, subject however to the regulations prescribed by the new orders of the 23 December, 1833. Ord. 29, Vid. 1, M. & K. App. xvii.

(o) 1 R. & M. App. viii. ix., by the 25th order, special applications during the long vacation are to be made to the Vacation Master. *Ante*, 532.

(p) By the 20th order application to withdraw replication and amend may be made to a Master. *Vide post*, 546.

(r) 1 R. & M. App. xii.

sary party to the suit, on the ground that such an amendment amounted to no more than the addition of a party. (s) Orders of this nature may be obtained without withdrawing the replication; (t) and it seems that the Court will, even after publication has been passed and the cause set down, suffer the bill to be amended by adding parties: (u) but it is to be observed, that if the parties be added after publication has passed, the cause as to such *parties [*545] must be heard upon bill and answer only. (u) A bill, however, cannot be amended after publication in any other respect than by making parties, and no new change can be introduced, or material fact put in issue, which was not so before; but a supplemental bill should be preferred. (x) And where a plaintiff, by a false suggestion that *the cause was at issue only*, had obtained an order for liberty to amend his bill, by the addition of a prayer which had been accidentally omitted, the order was discharged upon a motion made by the defendant at the opening of the cause when it came on for hearing. (y) It is said, in an anonymous case, in Atkyns, (z) that, after publication has been passed, there is no instance of a plaintiff obtaining an order to amend without withdrawing his replication. The observation, however, appears to be a mere *dictum*, and it certainly cannot apply to cases where the amendment is merely by adding parties, in which case to require the replication to be withdrawn previously to the amendment would be absurd, as the only purpose answered by withdrawing it must be that of enabling the plaintiff to reply, *de novo*, to the answers of the new defendants, which would be useless, the rule being, as above stated, that, in such cases, the cause as to those defendants must be heard upon bill and answer only.

Where it is intended to amend a bill after replication filed, by the addition of new facts or charges, the proper course is to apply for leave to withdraw the replication and amend; an order of this description might, according to the old practice of the Court, have been obtained at any time before publication; sometimes it was granted as a matter of course, without notice of motion, and sometimes notice was given, as in the case before referred to of a motion to withdraw a replication and amend a bill, after a plea had been allowed. (a) [*546] *And so also where such a motion was made after replication filed in consequence of an undertaking to speed cause. (b)

All difference in the practice in this respect has however been removed by the fifteenth of Lord Lyndhurst's orders, by which it has been ordered that after replication has been filed, the plaintiff shall not be permitted to withdraw it and to amend the bill, without a special order of the Court for that purpose made upon a motion of which notice has been given, *the Court being satisfied by affidavit that the matter of the proposed amendment is material, and could not with reasonable diligence be sooner introduced into the bill.* In conse-

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(s) Brattle v. Waterman, 4 Sim. 125; Andree v. ——, 2 Dick. 768.
(t) Ibid. (u) Hind. 25.
(x) Goodwin v. Goodwin, 3 Atk. 371; Milligan v. Mitchell, 1 Mylne & Craig. 433.
(y) Harding v. Cox, 3 Atk. 583. (z) 1 Atk. 51.
(a) Carleton v. L'Estrange, *ubi supra*, p. 526. According to the practice of the Court of Exchequer, which is nearly the same as that which formerly existed in Chancery, a plaintiff may, after replication, amend his bill, and it is a motion of course to withdraw his replication and amend upon payment of the usual costs, which are 23*s*. for withdrawing the replication, and 20*s*. for amending the bill; but, if after a defendant has procured an order to dismiss *nisi*, the plaintiff, in order to retain it, files a replication, he cannot, after being thus dilatory, have an order to withdraw replication and amend as of course, but he must give notice of his motion and satisfy the Court by affidavit, not only that the amendments are material, but that they could, by due diligence, have been inserted before, Turner v. Chalwin, 1 Fowl. Ex. Pr. 112; 3 Anst. 807.
(b) Myers v. ——, 4 Mad. 268; Pitt v. Watts, 16 Ves. 126.

quence, therefore, of this order, by which motions to withdraw the replication and amend are constituted special applications, and of the twentieth of the orders of the 31 December, 1833, before referred to, such applications, as well as those for leave to amend bill, must be heard and determined by the Master in rotation. It has, however, been decided by the present Vice Chancellor, that this order does not apply to amendments by adding parties after replication. (c)

According to the old practice of the Court no time was specified in the order for liberty to amend, within which the amendment must be made, but by Lord Lyndhurst's orders, (d) it is provided that every order for leave to amend shall contain an *undertaking by the plaintiff to amend his bill within three weeks from the date of the order*, and in default thereof such order shall become void, and the cause shall, as far as relates to any motion to dismiss the bill for want of prosecution, stand in the same situation as if such order had not been made.

By the nineteenth amended order, (e) the time which occurs between the last seal after Trinity term and the first seal before Michaelmas term, and between the last seal after *Michaelmas term, and the first seal before Hilary term, is not to be reckoned in computing the time which is allowed [*547] for amending a bill.

It is to be observed that the effect of the fourteenth order is to place a defendant in an injunction suit in a somewhat worse situation than he was in under the old practice, for according to that, where a plaintiff upon exceptions allowed or submitted to, had obtained an order for leave to amend his bill, and for the defendant to answer the amendment and exceptions, at the same time, the defendant had a right immediately to move that he might make his amendments within ten days, or that the order might be discharged; (f) but now the defendant must wait till the three weeks are expired before he can answer the exceptions.

When an order to amend has been obtained, the first thing to be done is to serve it upon the defendant (or defendants, if more than one.) in the usual way; (g) and it is to be observed that where it is to be done upon payment of costs, those costs must be paid, or tendered, before any further proceedings are had, otherwise such further proceedings will be nugatory. (h)

The amendments having been duly prepared, and the draft signed by counsel, (i) the record must be amended by interlining, provided the same can be done so as to make the record fair and legible, or if the amendment be by omit-

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(c) Brattle v. Waterman, 4 Sim. 125. (d) Ord. 3 December, 1828, 14.
(e) Ord. 23 November, 1831.
(f) Whitehouse v. Hickman, 1 S. & S. 105; Benedict v. Thackeray, 5 Price, 592.
(g) Woodhouse v. Meredith, 1 Jac. & W. 204, 8.
(h) Hinde, 22.
(i) *Ante*, p. 410. In addition to the cases before cited may be mentioned that of Burch v. Rich, 1 Russ. M. 157, in which a solicitor, after a bill had been prepared and signed by counsel, took upon himself to alter the draft by the introduction of new matter, upon which the bill was demurred to, whereupon the plaintiff's solicitor obtained the usual order to amend, and did so by striking out the matter which he had himself introduced, and leaving the bill in the state in which it was when it received the counsel's signature, but without again laying the draft before counsel upon a motion to take the amended bill off the file on the ground that it had never received the signature of counsel, the Vice Chancellor refused the motion, but Lord Lyndhurst, upon appeal, made the order.

[*548] ting original matter, it is done by striking the same through with a pen. (k) *With respect to the quantity of matter which may be introduced into a record without requiring a new engrossment, that appears to be limited in practice to two Chancery folios, or 180 words in each place; (l) if the amendment exceeds that quantity of words in any one place, or the bill has been so often amended that the amendment inserted, though under two folios, cannot be interlined upon the record, or are so considerable as to blot and deface it, a new engrossment must be made and annexed to the original record. (m) At the time of leaving the new engrossment, the clerk in Court should be informed that it is an amended bill, and the order to amend should be left at the same time, without which the amended bill cannot be filed, and if filed as an original bill much difficulty would be experienced in rectifying the mistake. (n)

The amended bill being thus on the file, the plaintiff's clerk in Court (the order to amend having been previously served) should, in cases where the order has been made upon the plaintiff's undertaking to amend the office copy of the defendant, call upon the defendant to produce his office copy in order that it may be amended, and the defendant being thus apprised that the order to amend has been acted on, must leave his copy with the plaintiff's clerk in Court for the purpose. (o)

It seems formerly to have been considered to be the duty of the defendant, on being served with the order, to bring his copy to the plaintiff's clerk in Court, to be altered, and that the plaintiff was not bound to procure the defendant's office copy of the bill for the purpose of amending it, if the defendant's clerk in Court did not think fit to bring it to the plaintiff's clerk in Court; (p) but that practice was evidently liable to inconvenience, especially under the old practice, by which a considerable time might have elapsed between the service of the order and the amendment, and the practice now appears to be as above stated. Where a defendant, however, has had notice that the amendment has been made, and does not think proper to take the necessary steps to get his [*549] copy altered, but suffers the cause *to come to a hearing, the Court will not permit him to take advantage of the objection at that period; therefore, where a plaintiff had served the order to amend, and had neglected to apply to the defendant for his copy, but it appeared that the cause having subsequently abated by the marriage of a female plaintiff, it had been revived, and the order for revivor, (in which, as well as in the bill of revivor.) the amendment was noticed, served upon the defendant, it was considered that this was sufficient notice of the amendment. (q)

Where a plaintiff, after appearance and before answer, obtains an order to amend without costs, upon his undertaking to amend the defendant's office copy, and it afterwards turns out that his amendments are too extensive to permit of their being introduced into the original engrossment, he may, on payment of the 20*s.*, which, had the usual order been made sanctioning such an amendment, would have been the sum which he would have been liable to pay, amend his bill by a new engrossment without procuring a new order for that purpose. (r)

It is to be observed that an amended bill is not considered to be on the file for the purpose of an attachment for want of an answer before an entry has been made of the amendment in the Six Clerks' book, and that there is not any

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(k) Hinde, 22.
(l) 1 Turn. & V. 169.
(m) Ibid. Hinde, 22.
(n) 1 Turn. & V. 170.
(o) Woodhouse v. Meredith, 1 Jac. & W. 204.
(p) Lloyd v. Lloyd, 2 Cox, 431.
(q) Lloyd v. Lloyd, 2 Cox, 431.
(r) Cox v. Champneys, Mad. & Geld. 314.

difference in this respect between the amendment of a bill which has been answered, and the amendment of one which has not been answered. (s)

Where a plaintiff, after answer, has obtained an order to amend, without requiring any further answer, *and shall have amended the bill* any otherwise than by an alteration in names, dates or sums, or the correction of clerical errors only, the defendant, as of course, has eight days' time to consider whether it is necessary for him to answer the same, within which time he may, if he please, put in an answer *gratis*. (t) If no answer is put in, the plaintiff, at the end of eight days, is at liberty to file a replication, or to set down the cause for hearing on bill and answer, unless the defendant shall have previously served an order for time to answer, or taken and *served a warrant for time to answer such amended bill, in which case the Master [*550] may allow the defendant such time (if any) for that purpose as he shall think fit. (u) If a plaintiff takes advantage of an order for leave to amend without requiring a fresh answer, to insert in his bill a prayer for an injunction, he will not be allowed to move for an injunction upon merits confessed in the answer to the original bill till the eight days are elapsed, within which the defendant may put in an answer to the amended bill. (v) It seems, however, that in the Exchequer, where a bill was amended after answer, by adding a defendant only, it was held that the original defendant could not answer the amended bill. (x)

If a plaintiff requires an answer to his amended bill, he must serve the defendant with a *subpœna* for that purpose, (y) in the form required by Lord Brougham's orders, (z) unless he has upon exceptions allowed or submitted to, obtained an order for leave to amend and that the defendant may answer the amendment and exceptions at the same time, in which case no new *subpœna* is necessary to be served upon the original defendant. (a)

Formerly, a *subpœna* to answer an amended bill required personal service upon the original as well upon new defendants made by the amendment, but by Lord Lyndhurst's order, the service of a *subpœna* to answer an amended bill upon the clerk in Court of a defendant to the original bill is made good service. (b)

A defendant may not only answer an amended bill, but he may defend himself from the effect of the amendments by demurrer or plea; (c) as where a plaintiff amends his bill, and states a matter arisen subsequent to the filing of the bill, and properly the subject of a supplement bill or bill of revivor. (d) And it has been held, that a defendant may demur to an amended bill, even though he has previously put in a demurrer to the original bill. (e)

*It is said that if a matter which has arisen subsequent to the [*551] filing of the bill, and properly the subject of a supplemental bill is stated by amendment, and the defendant answers the amended bill, it is too late to object to the irregularity at the hearing; (e) it has, however, been recently decided that if a defendant by his answer to an amended bill claim the same benefit that he would have been entitled to had he demurred or pleaded in bar, he will be entitled to the same advantage at the hearing that he would have had,

(s) Adamson v. Blackstock, 1 S. & S. 120.
(t) Savory v. Dyer, Amb. 70; *vide etiam* Bolton v. Bolton, *ante*, p. 519.
(u) Orders, 21 December, 1833, 14.
(v) Savery v. Dyer, Amb. 70.
(x) Gill v. Mathews, 3 Anst. 879.
(y) Pennington v. Ld. Muncaster, 1 Newl. Pra. 197.
(z) Ord. 21 December, 1833, 1.
(a) Angerstein v. Clarke, 1 Ves. J. 250.
(b) Ord. 3 April, 1828, 20.
(c) Lord Red. 169, 234.
(d) Ibid.; 1 Atk. 29.
(e) Bancroft v. Wardour, 2 Bro. C. C. 66; 2 Dick, 67, S. C.
(e) Lord Red. 169, 234.

had he put in a formal plea or demurrer to the amended bill, (*f*) and that he will not be prejudiced as to costs by allowing the cause to proceed. And in *Milligan* v. *Mitchell*, (*g*) where the amendments were introduced into a bill irregularly, and the defendant, instead of coming to the Court by motion to complain of the irregularity, put in his answer, in which he insisted upon the objection, and reserved to himself the same benefit of it as if he had pleaded it in bar, to which answer the plaintiff replied, and set the cause down for hearing; Lord Cottenham, after ordering the amended bill to be taken off the file, and all the proceedings upon it to be set aside as irregular, held that although the defendants might certainly have prevented considerable delay and expense by bringing the objection immediately before the Court, the costs ought to be borne by the plaintiffs.

The proper course, however, to be pursued in general by the defendants, where a bill has been irregularly amended, is to apply to the Court by motion either to have the amended bill taken off the file, or to have the amendments expunged. The former motion is applicable to cases where there has been a new engrossment, the latter is adopted where the amendments have been merely made by interlineation of the old record.

We have seen above that in all cases where the plaintiff obtains leave to amend his bill upon payment of costs, the amount of costs to be paid to each [*552] defendant, or set of defendants, *who have taken office copies or answered, is limited to 20*s*. This sum has long been felt as very inadequate to remunerate the defendants for the expense incurred, and various attempts have from time to time been made to relieve them from the effect of it, where it has been made the means of oppression. In Lord King's time such attempts to vary from the rule were made, and in *Deggs* v. *Colebrooke*, (*h*) Lord Hardwicke expressed his intention of considering how to make a defendant some amends for being put to a great expense, by allowing him a more adequate compensation than only 20*s*. costs on the plaintiff's amending his bill after a long answer and other necessary proceedings on the part of the defendant. (*i*) But although his Lordship afterwards departed from the rule, he never altered it by any general regulation, nor was any adequate remedy provided for the injustice frequently produced by adherence to it till the new orders of 1828 were promulgated; by the 29th of which it is provided, "that where a plaintiff is directed to pay to the defendant the costs of the suit, then the costs occasioned to a defendant by any amendment of the bill shall be deemed to be part of such defendant's costs in the cause, (except as to any amendment which may have been made by special leave of the Court, or which shall appear to have been rendered necessary by the default of such defendant) but there shall be deducted from such costs any sum or sums which may have been paid by the plaintiff according to the course of the Court at the time of any amendment." (*k*)

By the 30th order it is directed, that when upon taxation a plaintiff who has obtained a decree with costs is not allowed the costs of any amendment of the bill, upon the ground of its having been unnecessarily made, the defendant's costs occasioned by such amendment shall be taxed, and the amount thereof deducted from the costs to be paid by the defendant to the plaintiff. (*l*)

[*553] We have seen before that where a plaintiff, after the answer has come in, finds himself unable to support his case as *stated, and

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(*f*) Wray v. Hutchinson, 2 M. & K. 235.
(*g*) 1 Mylne v. Craig, 433.
(*h*) 1 Atk. 396.
(*i*) Beames on Costs, 221.
(*k*) 2 Russ. App. 3.
(*l*) Ibid.

takes advantage of a common order to amend to change the whole nature of his Bill, he will not be permitted to do so without paying to the defendant all the costs he has been put to, beyond those he would have been charged with if the bill originally had been properly framed; (*m*) and also that where a plaintiff, after putting a defendant to great expense in preparing to meet a particular part of the case made by the bill, makes use of an opportunity of amending to strike out that part of his case, he will not be allowed by that means to deprive the defendant of the costs occasioned by the part of the bill so struck out. (*n*)

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*CHAPTER VII. [*554]

OF THE WRIT OF SUBPŒNA.

SECT. I.—*Against whom Issued.*

THE bill, being on the file, the next step is to sue out and serve a *subpœna*, which is a writ issuing out of the Court, and directed to the party himself, commanding him to appear (according to the old form of the writ) under a certain penalty therein expressed, (*subpœna centum librarum*) and answer to the matters alleged against him. This writ is frequently called the first process of the Court, but the term *process* is more properly applicable to those proceedings which are subsequently resorted to for the purpose of compelling obedience to the *subpœna*, in the same manner that the term process at common law is applied, not to the *original writ*, (which is that part of their proceedings which answers to the *subpœna* in equity,) but to the writs which are issued in case the defendant, upon being duly warned to obey the original writ, refuses to do so. (*a*) And it is to be observed, that the writ of *subpœna* differs from the other writs of process, in being directed to the party *himself*, whereas the subsequent writs or orders are directed, not to the party himself, but certain ministerial officers, commanding them to take certain proceedings against the defendant, calculated to enforce his obedience.

This writ must be issued and served upon all the parties defendant to a bill, (except the Attorney General, who being an officer of the Crown, always supposed to be present in Court, is, as we have seen, merely attended with a copy of the bill) (*b*) before a cause can be properly said to be commenced. It is to be observed, however, that before it is issued against a peer or peeress, it is necessary to procure in the first instance a letter *missive*.

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*SECTION II. [*555]

Of Letters Missive.

THE nature and form of letters missive have been before pointed out, (*c*) and all that remains now to be done, is to direct the reader's attention to the manner in which they are to be obtained and served.

(*m*) *Ante*, p. 517.
(*n*) *Ante*, p. 519.
(*a*) 3 Bl. Com. c. xix.
(*b*) *Ante*, 133.
(*c*) *Ante*, p. 501.

The first proceeding for this purpose is to leave a petition, praying for the letter missive, with the Lord Chancellor's secretary, who will get the petition answered, upon which being done in the affirmation, the letter missive must be bespoken at the same office. (c)

The original letter, with a copy of the petition, as answered, must then be served personally, or left at the defendant's place of abode. (d) An office-copy of the bill must also be served at the same time with the letter missive.

And by an order of the 28th November, 1783, persons having the privilege of peerage are not obliged to take or pay for any other copy of the bill upon their appearing thereto. (e)

It is to be observed, that this letter missive is only a compliment, it is not process to found proceedings upon, and the peer may appear to it or not, as he pleases; if upon such service he appears it is well, but if he makes default a *subpœna* must be awarded against him, because no subsequent process can be founded but upon a contempt to the Great Seal, which is the royal authority, and the contempt will not arise from the Chancellor's letter, which is *ex gratia*.

If a peer of the realm fails to comply with the *subpœna*, the subsequent process against him must be by writ of sequestration and not by attachment, as in the case of ordinary persons. (f)

[*556] *SECTION III.

Of the Form of the Writ.

A *subpœna* (as we have seen) is a writ issued in the name of the King, and directed to the defendant in the suit; and, according to the ancient term, it commanded and strictly enjoined the defendant, that laying all other matter aside, and notwithstanding any other excuse, he should personally appear before his Majesty in his Court of Chancery, on a certain day therein specified, wheresoever it shall then be, to answer concerning those things which shall be then and there objected to him, and to do further and receive what the said Court shall have considered in that behalf: and this the defendant was warned, that he might in no wise omit under the penalty of one hundred pounds.

The form of *subpœna*, as now issued in pursuance of Lord Brougham's orders, is as follows:—(g)

"*William the Fourth, by the Grace of God of the United Kingdon of Great Britain and Ireland, King, Defender of the Faith. To X. Y. greeting. We command you [and every of you, where more than one Defendant,] that within [four days, if a town cause, or eight days, if a country cause,] after service of this writ on you, exclusive of the day of such service; laying all other matters and excuses aside, you do cause an appearance to be entered for you, in our high Court of Chancery, to a Bill, [or as the case may be, "an Information"] filed against you by A. B. [and others, or another,] and that you do answer concerning such things as shall be then and there alleged against you; and observe what our said Court shall direct in this behalf, upon pain of an attachment issuing against your person; such other process for contempt as the Court shall award. Witness ourself at Westminster, the ——— day of ——— in the ——— year of our reign.*"

(c) Hinde, 82.
(d) Ibid.
(e) Hinde, 82.
(f) *Vide post*. Chap. VIII.
(g) Ord. 21st Dec. 1833.

*The following memorandum is directed to be at the foot of the writ:—"*Appearances are to be entered at the Six Clerks' Office, Chancery-lane, London.*" [*557]

The alteration which has been thus made in the form of the writ, appears to have been suggested by the report of the Chancery Commissioners of the 28th February, 1826; proposition 1 & 2, which recommended that the form of this writ should be altered, and the writ so formed, as upon the face of it, distinctly to inform the party upon whom it is served, what he is really required to do, and what will be the consequence of his disobedience.

According to the old practice, generally speaking, all *subpœnas* were returnable in Term-time only; but a plaintiff, in a town cause, (that is where a defendant resided in London, or within a certain distance from it,) was entitled to a particular privilege, enabling him out of term, upon an allegation, supported by affidavit, that a defendant lived in London, or within ten miles thereof, to obtain an order for a *subpœna* to appear and answer, returnable, as it is technically called "*immediately;*" which abbreviated the ordinary return, and relieved the plaintiff from the necessity of waiting till the following term. (*h*) The Commissioners for inquiring into the practice of the Court, adverting to the increased facility of communication which now subsists between the various parts of the kingdom, thought it unreasonable that any distinction should prevail between town and country causes, in this respect; and accordingly, among the alterations which they proposed in their report, they suggested, that every plaintiff, whether in a town or country cause, should at all times be at liberty, *without order*, to sue forth a *subpœna* to answer, returnable *on a day certain*, either in Term-time or vacation. This recommendation of the Commissioners was only partially adopted in Lord Lyndhurst's orders, which merely enabled the plaintiff to obtain *an order* for a *subpœna*, returnable immediately, without affidavit; (*i*) *but the form prescribed by Lord Brougham's orders appears fully to carry into effect the proposition of the Commissioners in [*558] this respect, by making all *subpœnas ad respondend;* returnable, not immediately, but within four days, if the cause be a town cause, or eight days if a country cause, *after the service of the writ, exclusive of the day of service.*

By this judicious alteration in the form of the writ much of the obscurity which was occasioned by it as originally framed, has been removed; and the defendant, upon whom it is served, is now distinctly informed by the writ itself, of what he is really required to do, and what will be the consequence of his disobedience.

It will be observed, that in the old forms of the writ, nothing was stated as to the day upon which the defendant was to appear in consequence of it; this was generally specified by indorsement, if it included only one defendant, and if there were more defendants than one, in what were termed the *labels*, (which were slips of parchment attached to the writ, in order that, when there were more defendants than one included in the same *subpœna*, they might be torn off, and served upon such of them as were not served with the writ itself:) the day of appearance now appears in the body of the writ. The names of the party, at whose suit the *subpœna* is issued, and the nature of the proceeding which the defendant is called upon to appear to, are now also inserted in the body of the writ; whereas formerly these matters were only mentioned in the label, and by indorsement on the writ. (*k*)

(*h*) Chan. Report, 1826; Explanatory Papers, prop. 1.
(*i*) Ord. 3 April 1828; 1. (*k*) Hinde, 78.

The defendant is also informed, by the memorandum at the foot of the *subpœna*, of the proper place to which he is to go, for the purpose of entering his appearance, in case he wishes to do so in person.

By the third order of the 21st December, 1833, the indorsement of the writ must contain the name or firm, and the place of business or the residence, of the solicitors or solicitor issuing the *subpœna;* and where such solicitors shall be agents only, then there must be further indorsed thereon the name or firm, and place of business or residence, of the principal solicitor or solicitors.

[*559] *By the ancient practice of the Court, the names of three defendants might be inserted in the same *subpœna*, husband and wife being accounted but as one : (*l*) and to each writ containing more names than one, there was a label for each additional name. (*m*) This label, as we have seen, was added for the convenience of *service* of the writ, which, in ordinary cases, was effected, where there were more defendants than one, by showing the *subpœna* and delivering a label to the two first, and leaving the writ itself with the last, or at his dwelling-house. (*n*) This method of service, however, was found to be frequently productive both of inconvenience and expense, for it often happened that one or both of the two first defendants could not be found so as to be personally served, before the return of the *subpœna*, in consequence of which the plaintiff was put to the delay and expense arising from the necessity of suing out a new writ. To remedy this, it was proposed by the Commissioners, that "a writ of *subpœna* should be sued out for each defendant, and that the costs of all such writs should be costs in the cause." (*o*) This proposition was carried into effect by Lord Lyndhurst's orders ; (*p*) but the practice of allowing three names in each *subpœna* has been restored by Lord Brougham's orders, (*q*) by which it has been ordered "that every *subpœna* other than a *subpœna duces tecum*, shall contain three names where necessary or required;" and the inconvenience alluded to, as arising under the old practice, has been obviated by the new form of the writ, and the method of service directed by those orders. The names of husband and wife are considered but as one name under the new practice, as well as under the old.

Care must be taken in making out the *subpœna* that there be no mistake in the form of the writ, for if there be any, and a defendant discovers it, he may take advantage of such mistake; and, if prosecuted for want of appearance, he may refer the *subpœna* for irregularity, and obtain costs. (*r*) If, however, in

[*560] the interval, between the time of suing out *the *subpœna* and the service of it, the plaintiff discovers any mistake or error in the names of the parties, he may correct it, and have the writ resealed upon payment to the clerk of the Subpœna-office of a fee of one shilling, and at the same time having a corrected *præcipe* of such *subpœna*, marked "altered and resealed," and signed with the name and address of the solicitor or solicitors suing out the same. (*s*)

It may be observed in this place, that where an infant was born pending a suit, and the parents, in order to interpose difficulties in the plaintiff's way, refused to have her baptized, an order was made that she should be described in the *subpœna* as the youngest female child of her father and mother. (*t*)

(*l*) Prac. Reg. 400.
(*n*) Ibid. 401.
(*p*) Ord. 3 April, 1828 ; 2.
(*r*) 1 Harr. 98.
(*t*) Eley v. Broughton, 2 S. & S. 188.
(*m*) Ibid.
(*o*) Cha. Report, 1826 ; 39 Prop. 3.
(*q*) Ord. 21 Dec. 1833 ; 5.
(*s*) Ord. 21 Dec. 1833 ; 7.

SECTION IV.

How sued out, and Issued.

To obtain a *subpœna*, the first process, under the old practice, was to leave a *præcipe* or the *subpœna*-note at the Subpœna-office, in the following form, viz: in Chancery. "*Subpœna A. B., C. D., E. F.* to appear in Chancery, returnable the 23d January, at the suit of *G. H.*, [or *G. H.* and another, or others.] This *præcipe* might be made out, either by the clerk in Court or the solicitor, (*u*) (who put his name at the bottom of it.) and was the authority upon which the *subpœna* was made out and sealed. The *præcipe* having been left, the *subpœna* was then made out by the officer of the Subpœna-office, who got it sealed with the Great Seal in the usual way. After which the *subpœna* was left at the clerk in Court's seat by the bag-bearer of the office, or, if bespoke by the solicitor, it remained in the office until he sent for it. (*x*)

A material alteration has, however, been occasioned in the practice with regard to the suing out and preparing the *subpœna* *issued by the Court of Chancery by the statute 3 & 4 Will. 4, c. 94, and the [*561] orders promulgated under its authority.

By the 31st section of the Act, it is enacted, "that the patentee of the Subpœna-office shall forthwith provide a seal, in such form and with such impression as the Lord Chancellor shall approve of; and that the Lord Chancellor for the time being may cause such seal or impression to be varied from time to time as to him may seem fit; and that any person desirous of issuing a writ of *subpœna*, such as has been heretofore issued by such patentee, may prepare such *subpœna*, and present the same for sealing, and the same shall henceforth be an open writ, and either in the present form, or in any other form which the Lord Chancellor may from time to time direct; and such writ shall, upon presentment thereof for that purpose, be forthwith sealed with such seal, and shall have the same force and validity as a writ of *subpœna* now has when sealed with the Great Seal."

In pursuance of the above section of the Act, it has been provided by the orders of the 21st December, 1833, "that all writs of *subpœna* in this Court shall be prepared by the solicitor of the party requiring the same, and that the seal for sealing the same shall be marked or inscribed with the words "Subpœna-office, Chancery:" and such writs shall be in the forms mentioned at the foot of the orders, or as near as may be, with such alterations and variations as circumstances may require." The second order, however, directs that a *præcipe* in the usual form, and containing further the particulars thereinafter mentioned (as to the names and residences of the solicitors issuing the same,) shall in all cases be delivered and filed at the Subpœna-office. The particulars required, with regard to the names and residences of the solicitors issuing the writs, are, "that the name or firm, and the place of business or residence of the solicitor or solicitors issuing a *subpœna*, shall be indorsed thereon; and that where such solicitors shall be agents only, then there shall be further indorsed thereon the name or firm, and place of business or residence of the principal solicitor or solicitors."

*In consequence of the above Act of Parliament and order, the practice now is for the solicitor of the plaintiff to prepare the *subpœna*, and to leave it, together with the *præcipe*, as above directed, at the Subpœna-office to be sealed; and the *præcipe* being the authority for the sealing of the writ, is filed in the office. [*562]

(*u*) 1 Harr. 97. (*x*) Ibid. 97.

Care must be taken in the case of the *præcipe*, as well as of the writ, that no mistake is made in it, either of the parties' names, plaintiff or defendant, or in the return, for any such mistake will vitiate the writ. (*y*)

By statute 4 Ann, c. 16, no *subpœna* or other process for appearance shall issue till after the bill is filed with the proper officer, and a certificate thereof brought to the Subpœna-office, except in cases of bills for injunctions to stay waste, or to stay suits at law commenced. (*z*)

In consequence of this Act, it was formerly the practice, after filing the bill, to procure a certificate thereof from the Six Clerk in the cause, and without such certificate no *subpœna*, except in injunction cases, could be issued. (*a*) That practice has, however, been discontinued, and the *subpœna* may now be sealed and issued without any such certificate.

It is, however, quite irregular to issue a *subpœna*, except in the cases specified in the Act, until the bill is on the file; and if a plaintiff does so, it is at risk of costs; (*b*) for if a defendant be served with a *subpœna*, and before the return he instructs a clerk in Court to search if any bill be filed, and it appears that no bill is filed, he may apply for costs, unless it be an injunction cause. (*c*)

It was in order to check a practice which formerly prevailed for the six clerks to antedate the bills, that the order before referred to, (*d*) "that no Six Clerk presume to antedate any bill, was promulgated." (*e*)

It is to be observed, that although a plaintiff issuing a *subpœna* before bill filed, does so at the risk of costs, he may nevertheless obtain an order to retain his bill, upon paying the defendant his costs out of pocket. (*f*)

[*563] *In cases which are within the exception in the Act, that is to say, where the bill prays an injunction, the bill need not be on the file before the return of the *subpœna*; (*g*) and, as the day of the return does not expire till twelve o'clock at night, (after the office is closed) it is considered that the bill is in time if it be on the file at the time of opening the office the following morning.

SECTION V.

Of Service of the Subpœna.

All *subpœnas* must be served before the last day of the term next following the term or vacation in which it is sued out. (*h*) And it is to be observed, that service on a Sunday is not good service; (*i*) so that where the last day of the term is on a Monday, the writ must be served before twelve o'clock on the Saturday night preceding. The service of a *subpœna* is either *ordinary or extraordinary*.

Ordinary service is effected by serving the party with the writ *personally*, or by leaving it *at his dwelling-house*, or usual place of abode. According to the new orders, personal service is to be effected by delivering a copy of the writ and of the indorsement thereon to the person served, and at the same time producing to him the original writ. (*k*)

Personal service upon an infant may, as we have seen, be effected in the same manner as service upon adults, though if the infant cannot be got at, the writ

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(*y*) 1 Turn. & V. 105.
(*a*) Ibid. 77.
(*c*) Ibid. 77.
(*e*) Beames's Ord. 168.
(*g*) Ibid. 104.
(*i*) Mackreth v. Nicholson, 1 Newl. Prac. 66.
(*z*) Hind. 76.
(*b*) Ibid. 76.
(*d*) *Ante*, 508.
(*f*) 1 Turn. & V. 104.
(*h*) Orders, 21 Dec. 1833; Ord. 7.
(*k*) Orders, 21 Dec. 1833; Ord. 4.

may be served upon his father or mother, or other guardian or person having the care of it. Such service, however, ought to be warranted by a previous order of the Court. (*l*)

Service upon a married woman may be effected by serving her husband; (*m*) and it seems that service on the wife was *under the old practice good service on the husband, if done by leaving the body of the [*564] *subpœna* with her at her husband's dwelling-house; (*n*) under the present practice, therefore, service of a copy of the writ upon the wife at her husband's dwelling-house will be good service upon the husband.

When the bill relates to the wife's separate estate, and the husband is abroad, the *subpœna* may be served upon the wife alone. (*o*)

If a bill be filed against a corporation, the process must be served upon some one of the members. (*p*)

Where a *subpœna* was served at the dwelling-house of the party, it was formerly necessary to leave the body of the writ itself with some one of the family there; but now it is ordered, that in all cases where a *subpœna* might formerly have been served by leaving the body thereof at the party's dwelling-house, or otherwise than personally, it shall be sufficient to leave a copy of the *subpœna* with the person upon whom it is served, producing the original writ to such person. (*q*)

Service at the dwelling-house to be good, without special order must be at the place where the defendant actually resides, and the mere leaving the writ or the copy at a defendant's ordinary place of business, if he does not reside there, will not be good service; and therefore where, under the old practice, a *subpœna*, returnable immediately, was moved for upon affidavit, stating that the defendant lived at Epsom, but that he had chambers in the Temple and resided there, Lord Thurlow said that as it did not appear that his place of abode was in the Temple he could not make the order. (*r*) Where, however, a Member of the House of Commons having a house at Southampton and no town residence, was served with a *subpœna*, returnable immediately, at a friend's house in London, with whom he was upon a visit, and for default of appearance a sequestration had been awarded, and a motion was made at the instance of the defendant to set aside the sequestration for irregularity, Lord Thurlow said he could not suppose that the defendant, a Member of Parliament, during the session *of Parliament had no town residence, or that the residence above stated [*565] should not be taken as a residence *quoad* the defendant, whose duty it was to attend, and actually did attend the House, and therefore refused to grant the motion. And so where a letter missive, and subsequently a *subpœna*, had been served at the town residence of a Peer during the sitting of Parliament, Lord Thurlow appears to have been of opinion that it was good, (*s*) and in a recent case where a letter missive, and afterwards a *subpœna*, had been served at the town residence of a Peer, who at the time was abroad, and afterwards an order *nisi* for a sequestration was issued, the Vice Chancellor refused a motion to discharge the order *nisi* and his Honor's decision was confirmed by the Lord Chancellor, (Lord Brougham). (*t*)

Formerly, where the defendant was a Member of the House of Commons, service at his dwelling was the most convenient and most usual way of serving him, because, previously to the 47 Geo. 3, c. 40, the service of the writ upon

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(*l*) *Ante*, 229.
(*m*) *Ante*, 216.
(*n*) *Ante*, 217.
(*o*) Ibid.
(*p*) Hind. 87.
(*q*) Orders, 21 Dec. 1833; Ord. 4.
(*r*) —— v. Shaw, Hind. 92.
(*s*) Attorney General v. Earl of Stamford, 2 Dick. 744.
(*t*) Thomas v. Earl of Jersey, 2 M. & K. 398.

a Member of the House of Commons was accompanied by an office copy of the bill, signed by the proper Six Clerk or his deputy. The above statute has however dispensed with the necessity of this proceeding.

It should be observed that if there be any irregularity in the service of the *subpœna*, the defendant, if he means to avail himself of the objection, should not appear, as by so doing he will waive the irregularity. He should move to discharge the attachment when it issues. (*u*)

Where a *subpœna* cannot be served by either of the *ordinary* methods before pointed out, *extraordinary* means may be resorted to. Such service, however, ought in general to be warranted by a previous order of the Court, though sometimes where an extraordinary service has been effected the *Court [*566] have considered it to be good; thus where A., who served the *subpœna*, deposed that he hung the same upon B.'s door, and within half an hour after saw him abroad with a writ in his hand, which he supposed to be the *subpœna*, an attachment was awarded, and B. committed to the Fleet for his non-appearance; (*x*) and it has been held good service, if a person keeps the door of his house shut, and refuse to open it, to leave the writ under seal hanging upon the door of the house, or to put it into the house under the door, or within the windows; but none of these are good service, unless it can be proved that such *subpœna* afterwards came to the defendant's hands, or he was in the house at the time, or had notice of it; as where a plaintiff made oath that he had heard the defendant confess that he had been served with a *subpœna*, but had not appeared. (*y*) And so where a person made oath that he showed and offered to deliver the *subpœna* to the defendant, but that he refused to accept it, and did not appear, an attachment was issued. (*z*)

In general, however, if an extraordinary service is necessary, the safest course is for the plaintiff to apply in the first instance to the Court, by motion, supported by affidavit stating the circumstances, for an order that the particular mode of service required may be good service. Orders of this nature have, as we have seen, been granted where infants have been secreted or kept out of the way, so that they could not be personally served; (*a*) and the Court has ordered that leaving a *subpœna* with the turnkey of a prison shall be good service on a prisoner at large, though if the defendant had been a close prisoner such service would be good without order. (*b*) With reference to this case, it is to be observed, that no process can be served upon a prisoner committed at the suit of the Crown without leave, though if he has once appeared you may go on against him. (*c*) In a case before Lord King, where an application was made that service of a *subpœna* on the turnkey of Newgate might be good service upon a prisoner who had been committed to that prison for *murder, [*567] of which he had been indicted, and a special verdict found, but not argued, his Lordship, as one of the commissioners of *oyer and terminer* before whom he was tried, made an order that the keeper of Newgate should admit the plaintiff's solicitor to serve the process upon the prisoner. (*d*)

(*u*) Bound v. Wells, 3 Mad. 434. It seems, however, to be necessary, before he moves to discharge the attachment, that he should enter his appearance with the Registrar, which can only be done on his entering into an undertaking that the sergeant-at-arms shall be sent against him in case he shall be found in contempt. *Vide post*, Chap. X. of Appearance.

(*x*) Rickers v. Stileman, Cary, 57.

(*y*) Waters v. Bird; How v. Maddock, Cary, 104, 115.

(*z*) Paris v. Thomas, ibid. 134.

(*a*) *Ante*, 299.

(*b*) Hind. 85.

(*c*) Anon. Mos. 237.

(*d*) Anon. Mos. 237.

Upon the same principle, where a defendant has quitted his residence and cannot be found, orders have been made that service at his last place of abode may be good service, (*e*) and in *Sir William Pulteney* v. *Shelton*, (*f*) an order was obtained, upon motion, that service at the last place of abode of the defendant's wife might be good service.

It seems, however, to be necessary, where service is to be made at the defendant's last place of abode, that the defendant should have resided at such place within the period of twelve months before the service of the writ; and where a writ was served at the defendant's last place of abode under an order, and it appeared afterwards that he had left his lodging above a year before, the Court held that the service was not good. (*g*)

The Court has permitted service of a *subpœna* to be made by sending it under cover to the person to whom the defendant had directed his letters to be sent; thus where a defendant had formerly frequented a certain public house, but had not been there for six months, and had concealed himself to avoid his debts, and had written to the plaintiff upon the subject of the suit, and desired him to send his answer to a particular address, an order that service of the *subpœna* by sending it under cover to that address was made. (*h*) We have seen, however, that where there was a covenant in a mortgage deed, that if the mortgagee should be desirous of filing a bill of foreclosure, service of a *subpœna* on a person therein named should be good service, Lord Thurlow refused to order substituted service upon such person, because to make the order sought involved the necessity of deciding upon the validity of the deed itself, which he could not do without having the party before him. (*i*)

*We have before seen that in cases where an injunction is sought to restrain proceedings at law by a party who is abroad, the Court [*568] will order service upon the attorney or agent of the party commencing the proceedings to be good service of the *subpœna* upon the client and principal, (*k*) and that in some cases also where injunctions are not sought, the Court have permitted service upon the agent or factor of a defendant abroad, acting in respect of the property in dispute, to be good service upon the principal. (*l*) The distinctions upon these heads have been before fully discussed and pointed out in Chap. IV. Sec. 12 of this Treatise, to which the reader is referred, as well for information upon this point as upon the remedies from time to time provided by the Legislature for the inconvenience arising from the defect of power in courts of equity to compel the appearance of parties who are either resident out of their jurisdiction, or who have absconded for the purpose of avoiding their process. (*m*)

SECTION VI.

Of Contempts of the Subpœna.

If upon service of this writ the defendant beat the party serving it, or use candalous or contemptuous words against the Court or the process thereof, he hereby commits a contempt of the Court, and the defendant is liable to punish-

(*e*) Parker v. Blackbourne, 2 Vern. 369.
(*f*) 5 Ves. 147.
(*g*) Parker v. Blackbourne, *ubi supra*.
(*h*) Hunt v. Lever, 5 Ves. 147.
(*i*) *Vide ante*, p. 266.
(*k*) *Ante*, p. 262.
(*l*) *Ante*, p. 268.
(*m*) *Ante*, p. 270.

ment by imprisonment; (n) and it appears to have been held that if upon a copy of the writ being served, and the writ shown, the person speaks with contempt before he knew its contents, or from what Court it issued, it will be a contempt. (o)

Contempts of this description are called extraordinary contempts, to distinguish them from those which are incurred by the mere act of disobedience to the ordinary process of the Court. Some difference appears to exist in the practice of the Court in cases of contempts of this nature, which consist *in the mere use of scandalous or contemptuous words, and those which consist of beating or other corporeal ill usage of the person serving it. It seems that where actual battery is proved, the offending party may be ordered to stand committed at once, upon motion, without further examination. (p) In such case, however, the battery must be proved by the affidavit of two witnesses; (q) and if it rests upon the evidence of one witness only, the Court will only make an order for the committal of the defendant, unless he shows cause against it within a limited time. (r)

[*569]

Where the contempt is by abusive and scandalous words against the Court, or the process thereof, and they are proved by the affidavit of two witnesses, the party offending may likewise be ordered to stand committed, upon motion, without further examination; (s) but where there is only the affidavit of one witness, the proper course appears to be to move for an attachment, whereupon the offending party may be brought up to be examined; and then if the misdemeanor shall be confessed, or proved against him, he shall stand committed, unless he satisfy the Court and pay the prosecutor his costs. (t) In such case, also, it seems that the misdemeanor, if not admitted, must be proved by the oaths of two witnesses, otherwise he must be discharged, though his discharge will, in such case, be without costs, in respect of the oath made against him. (u)

SECTION VII.

Of Counterfeit Subpœnas.

It is to be observed that a counterfeit *subpœna* does not oblige, and that whosoever serves it, if he knows it, misbehaves *himself, and an attachment will go against him for the contempt which he has thereby committed. (x) In Thatcher's case a clerk in Chancery was committed by the Lord Keeper for a very high misdemeanor in sending writs into the country with soft yellow wax upon them, without being sealed with the Great Seal, as if they had been actually sealed; and this was said to be a misdemeanor next to counterfeiting the seal; and he was bound in 1,000*l.* himself, and two more in 500*l.* each, for his appearance, in order for an information. (y)

[*570]

(n) 1 Newl. Prac. 67.
(o) Hind. 85.
(p) Beames, Ord. 204.
(q) Anon, 3 Atk. 219.
(r) Elliot v. Halmarack, 1 Mer. 302; Van v. Price, 1 Dick. 91; Morgan v. Jones, ibid. *Vide etiam* Williams v. Johns, 2 Dick. 477; 1 Mer. 303, n, where a similar order was made, and because the defendant was of a ferocious disposition, and no one dared serve him, it was further ordered that leaving the order at his dwelling-house should be good service.
(s) Beames, Ord. 205.
(t) Ibid.
(u) Ibid. As to the method of proceeding under attachments for contempts of this nature, *vide post*, Contempts.
(x) Hind. 86.
(y) 12 Mod. 355; Hind. 93.

SECTION VIII.

Of the Costs of the Subpœna.

UNDER the old practice of the Court the costs of suing out a *subpœna* to appear and answer were 6*s.* 8*d.* for drawing the *præcipe* and leaving the same at the office, (*z*) and 8*s.* for the *subpœna* if sealed at a general seal, when there was one defendant or two, (*a*) and when there were three defendants, 8*s.* 6*d.* If the writ was sealed at a private seal when other matters were sealed, there was an extra fee of 3*s.* 6*d.* charged for sealing; and if the Great Seal was opened expressly for the purpose, the charge was two guineas extra. (*b*) But by the present practice, as regulated by Lord Brougham's orders, (*c*) the amount to be allowed in costs for every *subpœna* other than a *subpœna duces tecum*, including the *præcipe*, attendance, and sum paid for sealing, is fixed at 5*s.* 10*d.*; (*d*) *in addition to which sum the solicitor suing out the same [*571] is to be allowed one fee of 6*s.* 8*d.* for the *præcipe* and attendance on such sealing, as heretofore, when the number of names included therein shall not exceed nine, and if they shall exceed nine in number, then an additional fee of 6*s.* 8*d.*; and if they exceed eighteen, a further fee of 6*s.* 8*d.*, and so in proportion for every additional number of nine names included in such *præcipe*.

By the second of Lord Lyndhurst's orders (*e*) the costs of all *subpœnas* to appear are directed to be costs in the cause.

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*CHAPTER VIII. [*572]

OF PROCESS OF CONTEMPT.

SECT. I.—*Of Contempts in General.*

WHERE a party having been duly served with a *subpœna* neglects or refuses to appear, he is said to have incurred a contempt of the Court; and so he does if, having appeared, he refuses to answer or to obey any decree or order which the Court may think proper to make.

Contempts of the nature above alluded to are styled *ordinary* contempts, or contempts in process; and as they merely relate to the transactions between

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(*z*) 1 Turn. & V. 3.
(*a*) Ibid. 104.
(*b*) Ibid. 105.
(*c*) Ord. 21 Dec. 1833; Ord. 5.
(*d*) By stat. 3 & 4 W. 4., c. 94, s. 31, it is enacted that there shall hereafter be paid for each *subpœna* on the same being sealed, the sum of five shillings and sixpence, which sum shall be received by the patentee of the Subpœna office until his death or resignation of, or removal from, his said office, who, out of such sum so to be received by him, shall pay to the receiver of the sixpenny writ duty the sum of sixpence; to the chaff wax and his deputy, for their equal use, the sum of twopence, and to the sealer attached to the Great Seal and his deputy, for their equal use, the like sum of twopence; and from and after the death, resignation, or removal of the present patentee, such writs of *subpœna* shall be sealed by the said clerk of the affidavits, who shall thenceforth receive the same sum of five shillings and sixpence, and after discharging the like fees and outgoings to the several before mentioned officers, shall pay what may remain to the said Accountant General, to be by him placed to the credit of the said account, entitled "The Suitors' Free Fund Account."
(*e*) Ord. 3 Ap. 1828.

party and party, the offender may purge his contempt, by doing whatever the act is, the non-performance of which has brought him into contempt, and paying to the other party whatever costs may have been occasioned by this conduct.

Ordinary contempts are divisible into such as are committed by non-obedience to the *subpœna*, and such as are committed by non-obedience to a decree or order. The latter species of contempt will be the subject of a future Section of the Chapter upon Decrees.

There is another species of contempt in which the dignity of the Court is chiefly concerned, and which cannot be purged by mere satisfaction to the party, but may be the subject of punishment by the infliction of imprisonment or fine. These are called *extraordinary* contempts, and are the subject of peculiar modes of proceeding, which will be pointed out in another part of this Treatise.

At present the reader's attention will be drawn to the method to be adopted when a party is guilty of a contempt by non-obedience to the *subpœna*, which, [*573] where the *party is a corporation aggregate, is, as we have seen before, by issuing a writ of *distringas* directed to the sheriff or other proper officer, commanding him to distrain the lands and tenements, goods and chattles of the corporation, till the corporation appears to or answers the bill. (*a*)

Where the party is a corporation sole, or other individual not entitled to privilege of Parliament, process is commenced by issuing *an attachment*, which is a writ directed to the proper officer, commanding him to take the contumacious person, and to bring him before the Court to answer touching his contempt, and such other matters as shall be alleged against him.

In the case of a Peer of Parliament, or a Member of the House of Commons, whose persons are privileged from arrest, the process of contempt is commenced by issuing a *sequestration*, which is a writ or commission authorizing the person to whom it is directed to enter upon the real and personal estate of the party in contempt, and to take the rents, issues and profits into their own possession, &c., till the contemnor shall do what is required of him. The same process is also resorted to when the party is an officer of the Court.

SECTION II.

Of the Writ of Attachment.

It has been stated, that the first process against an individual not privileged, either for not appearing or not answering, is an attachment, which is a process that issues out of all Courts of Record in cases of contempts, and is awarded by the judges, at their discretion, on a bare suggestion, or on their own knowledge. In this Court it issues under the Great Seal, and is directed to a sheriff or other ministerial officer, commanding him to *attach* the party, so that he may be brought before the Court to answer touching his contempt, &c.

The word *attachment* is derived from the French word *attacher*, which sig- [*574] nifies to take or apprehend, by commandment *of a writ or precept; (*b*) and "it differs from *arrest*, in that he who arresteth a man carrieth him to a person of higher power to be forthwith disposed of; but

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(*a*) For the method of proceeding to compel the appearance or answer of a corporation aggregate, *vide ante*, p. 190.

(*b*) Jacob. Law Dict.

he that attacheth keepeth the party attached, and presents him in Court at the day assigned. (c) The writ is in the following form :

William the Fourth, &c. To the sheriff of Surrey, greeting. We command you to attach C. D., so as to have him before us in our Court of Chancery, wheresoever the said Court shall then be, there to answer to us as well touching a contempt which he, as it is alleged, hath committed against us, as also such other matters as shall be then and there laid to his charge; and further, to perform and abide such order as our said Court shall make in this behalf; and hereof fail not, and bring this writ with you. Witness ourself at Westminster, this day of , in the year of our reign, &c.

To the bottom of this writ, on the right hand side, must be put the surname of the Master of the Rolls, or of the Six Clerk in whose division the writ is made out, and the object of the writ must be expressed by endorsement, viz: "*By the Court, for not appearing (or answering) at the suit of A. B. plaintiff.*" The surname of the Clerk in Court who makes out the writ must also be written on the back, somewhere about the middle. (d)

There is also appended to the writ a label or direction expressing the nature of the writ, and the day of the return, viz: "*To the sheriff of, &c. An attachment against C. D. for not appearing (or not answering) at the suit of A. B., returnable on the day of .* (e)

This process issues for a contempt, as well in not appearing as in not answering after appearance; and as the rules of proceeding in both cases are similar, the observations in the ensuing Sections must be taken to apply to both species of contempt, unless where a distinction is expressly pointed out.

It is to be observed an attachment for not appearing and *not [*575] answering will not issue against the Attorney General, whose non-appearance, upon being attended with a copy of the bill, will not be considered as a contempt, but as a *nil dicit;* (f) nor can such a process be issued against a corporation aggregate, which being an ideal or invisible person, existing only in the contemplation of law, cannot be attached or apprehended. (g)

An attachment would also, as we have seen, be an improper process to issue against a Peer or other person having privilege of Parliament, against whom the first process is by sequestration, unless in the case of an infant Peer, against whom it seems that an attachment may be sealed, for the purpose of affording foundation for an order for a messenger; but in such case, as well as in the case of all other infants, the attachment is never executed. (h)

It is likewise unusual to issue an attachment against the warden of the Fleet, who is always supposed to be present in Court; (i) and it seems that a sworn clerk is also exempted, and that the proper process against him is a sequestration *nisi*, which is tantamount to a suspension from office, which was formerly the course of proceeding to enforce his appearance. (k)

Ordinarily, if a *feme covert* be in contempt the husband must be included in the attachment; (l) the Court has, however, stayed process of contempt against him for want of his wife's answer, where it has appeared by affidavit that she had left him, and that he had no power over her. (m) And cases may exist where she may be attached alone, as where her husband is out of the realm, and she is sued in respect of a debt on her separate estate, (n) or where she

(c) Ibid.
(d) Hind. 103.
(e) Ibib.
(f) *Ante*, 183.
(g) *Ante*, 189.
(h) *Ante*, p. 230, n. (z).
(i) Anon., Mos. 238.
(k) Corbyn v. Birch, 2 Dick. 635.
(l) Prac. Reg. 53.
(m) *Vide ante*, 208.
(n) *Ante*, 205.

obstinately refuses to join with her husband in his defence, or has committed a tortuous act, (*o*) or where she has obtained an order to answer separately, and does not put in her answer in conformity with such order. (*p*)

[*576] *By the standing order of the Court, all process of contempt must be made out into the proper county where the party against whom the same issues is resident or dwelling, unless he shall be then in or about London, in which case it may be directed into the county where he shall then be. (*q*) It is particularly necessary that this rule should be attended to where an attachment has been issued for want of an answer, and it is intended to proceed to take the bill *pro confesso*, under the 1 W. 4, c. 36, s. 15, without the intermediate process of attachment with proclamation, pursuant to rule 1, of that section; because by that rule an affidavit is required to be made by the solicitor of the plaintiff or his town agent, that the person suing forth such writ verily believed that at the time of suing forth the attachment, the defendant was in the county into which such writ was issued.

It seems, however, that in ordinary cases a plaintiff may at the same time sue out two or more attachments against the same defendant into different counties, but only one of them must be executed, otherwise the party would be liable to an action; (*r*) and where, a defendant being in contempt, the attorney sued an attachment into Kent and another into London, and arrested the defendant upon each, upon this being shown to the Court, costs were ordered to be taxed by the Master, for irregularity and vexation; but in regard that the plaintiff was poor, the Court, upon his prayer, ordered the costs to be paid by the defendant out of a sum of 600*l.* decreed to the plaintiff and resting in Court, and the defendant was set at liberty without entering his appearance with the Registrar, for the Court said none should take advantage of his own wrong. (*s*)

If the defendant resides in the county palatine of Lancaster, the attachment must be directed to the Chancellor of the Duchy, or his deputy, commanding him to issue his mandate to the sheriff, to attach the party; and to enforce obedience, it is necessary to obtain an order, which is of course upon the Chancellor, to return the writ, and afterwards an order upon the sheriff to return the mandate. (*t*)

[*577] *Formerly writs in process against persons resident in the counties palatine of Chester or Durham were addressed to the Chamberlain of the first and the Bishop of the second; but since the statute 10 Geo. 4, 1 Will. 4, c. 70, by which the jurisdiction of the Chamberlain of the county palatine of Chester has been abolished, such writs have been addressed to the sheriff. By the 6 & 7 Will. 4, c. 19, the secular jurisdiction of the Bishop of Durham has been transferred to the King, so that process directed to that county must now be addressed to the sheriff, and not the Bishop.

Where the defendant is in a city or town which is a county in itself, the writ must be directed to the sheriff of city or town.

If the defendant resides within the Cinque Ports, the attachment is directed to the Lord Warden of the Cinque Ports; and if the defendant is a prisoner either in the Fleet or King's Bench prisons, the process must be directed to the Warden of the Fleet, or to the Marshal of the Marshalsea. (*u*)

According to the old practice of the Court, this writ, as well as all other process of contempt, must have been returnable in Term time; (*x*) and it was also requisite where it was intended to proceed to a sequestration, or to take a bill

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(*o*) *Ante*, 206.
(*p*) *Ante*, 211.
(*q*) Beames, Ord. 199.
(*r*) 1 Smith, Ch. Pra. 84.
(*s*) Prac. Reg. 48.
(*t*) 1 Turn. & V. 113.
(*u*) 1 Harr. 122. Trotter v. Trotter, Jac. 533.
(*x*) Hind, 101.

pro confesso, that there should be fifteen days between the *teste* (or date) and the return of the writ, unless the defendant lived within ten miles of London, when an order might be obtained, by motion or petition of course, to make the several processes returnable *immediately*. (*y*) In order, however, to save the expense of the order for a writ returnable immediately, in a town cause, and also to get rid of the delay in the process occasioned by that proceeding, a clause has been introduced into the 1 Will. 4, c. 36, s. 15, rule 3, by which it is provided, "that the party prosecuting any contempt shall be at liberty, *without order*, to sue forth the several *writs in process of contempt returnable immediately, in case the party in contempt resides or is in London, or within twenty* miles thereof, and that in other cases the party prosecuting a contempt shall be at liberty, *without order*, to sue forth such several writs returnable in vacation, *provided that there be fifteen days between the *teste* and the return of each writ." (*c*) [*578]

The effect of this Act is, to extend the power of issuing attachments and other process returnable in vacation to all cases, with the restriction, that, where the party resides *above twenty miles* from London, there shall be *fifteen days* between the *teste* and the return, and to permit such process to be issued without a previous order to that effect.

It is to be observed that where an attachment is issued not returnable immediately, but of which the return must take place in Term time, it must still, as before, be made returnable on a general return day; thus when the last of the fifteen days required by the above rule of the 1 W. 4, c. 36, falls in Term time, the attachment must be made returnable on one of the general return days of the Term occurring after the expiration of the fifteen days. (*d*)

An attachment cannot have a longer return than the last return of the Term following that in which it is *tested*; if made returnable immediately, it is only in force until such last return of the following Term; and if executed afterwards, its execution is liable to be discharged for irregularity. (*e*)

Formerly no attachment or other process issued without order, (*f*) but now the ordinary process of contempt, namely, attachment, attachment with proclamations, and commission of rebellion, issue without order, (*g*) unless in cases where they are issued against defendants residing in parts of the United Kingdom out of the jurisdiction of the Courts at Westminster, or in the Isle of Man, under the 2 W. 4, c. 33, (*h*) and 4 & 5 W. 4, c. 82, (*i*) in which an order is required to authorize the issue of the process, and, it seems, that such order can only be granted, where the defendant has already been served with a *subpœna* under those Acts, upon motion, of which personal notice has been given to him. (*k*)

*In the case of a *feme covert* also, an attachment cannot be issued against her alone, without an order, (which must be obtained upon [*579]

(*y*) Ibid.

(*c*) Sugden's Acts, by Jemmett, 63. The number of days specified within which a writ is expressed to be returnable appears to mean *entire* days. Mootham v. Waskett, 1 Mer. 243. Under the old practice the fifteen days were reckoned exclusively of the day of the *teste*, but including the day of the return. 1 Px. Alm. 32.

(*d*) 1 Smith, Ch. Prac. 85. (*e*) Ibid.

(*f*) Beames, Ord. 113, 273

(*g*) Gilb. For. Rom. 81. Edwards v. Pool, 2 Dick. 693.

(*h*) *Ante*, 277. (*i*) *Ante*, 279.

(*k*) Harsluck v. Stewart, 6 Sim. 321.

notice) (*l*) unless there has been a previous order for a separate answer; (*m*) and where, after appearance, an attachment was moved for against a *feme covert* executrix, whose husband was abroad, the Vice Chancellor said the proper course was first to move (upon notice) that she might answer separately. (*n*)

It has been held, however, that where a defendant has been discharged out of custody upon promising to put in an answer, and the costs of contempt have been accepted but no answer is put in, it is necessary, in order to authorize the clerk in Court to make out another attachment, that an order for this purpose should be obtained. (*o*)

In ordinary cases, where an attachment for want of appearance is to be sued out, an affidavit must be made by the person who served the *subpœna*, containing positive and certain averments of the time, place and manner of service, (*p*) and of default having been made in appearance. (*q*) And the solicitor for the plaintiff must then apply to his clerk in Court, and bespeak an attachment, producing at the same time the original affidavit of service as his authority for issuing the writ. This affidavit must be filed *before the process is issued.* (*r*)

If the attachment is for want of an answer, no affidavit is necessary, and in such cases it seems to be the usual practice for the Clerk in Court previously to acquaint the adverse clerk in Court with his intention to issue it. This, however, is a mere matter of courtesy, which he need not observe unless he please. (*s*)

[*580] *When the clerk in Court has made out the writ he delivers it to the bag-bearer of the Six Clerks' office, who will get it sealed. If intended to be sealed at a general seal, it is *tested* for that day, but if left with the bag-bearer for the first private seal, or if sent down to the Lord Chancellor in vacation, it bears *teste* on the day on which it is left with the bag-bearer, and not on the day on which it may be sealed. (*r*) In Term time every day is a seal day.

It is to be observed that if an attachment is sealed before the party is in contempt it will be irregular, although it is not executed till after the contempt has been incurred.

When the attachment has been sealed, the purpose for which it is issued must be indorsed upon it, as "*for want of appearance*" or "*want of answer*," (*s*) and then the clerk in Court must, previously to issuing the writ, enter it, and the cause for which it is so issued, in the Registrar's book, and if not so entered it may be set aside for irregularity. (*t*)

(*l*) Bushell v. Bushell, 1 S. & S. 164. (*m*) Powell v. Prentice, *ante* p. 211.
(*n*) Bunyan v. Mortimer, Mad. & Geld. 278.
(*o*) Anon. 1 Turn. and V. 107. (*p*) Hind. 102.
(*q*) 1 Newl. 70.
(*r*) Broomhead v. Smith, 8 Ves. 357. Gardner v. Rowe, 4 Russ. 578.
(*s*) 1 Harr. 117. The practice of the Six Clerks' office has long been for the clerks in Court to give each other two days' notice, in writing, before the sealing of an attachment for want of an answer: and it seems, from an order in Hand's Solicitors' Assistant, p. 33, that where the plaintiff's clerk in Court had given notice to the clerk in Court for the defendant that he would on the next day seal an attachment against the defendant, upon which the defendant's clerk, on the same day, gave notice to the plaintiff's clerk that he would move for six weeks' time, and accordingly, on that day, obtained the order for time, but did not serve it till two days afterwards, previously to which, however, the plaintiff's clerk sealed the attachment, the attachment was set aside, with costs, as having been obtained contrary to the constant and uniform practice of the office.
(*r*) 1 Smith Ch. Pra. 84. (*s*) Hind. 102.
(*t*) James v. Philips, 2 P. Wms. 657. Smith v. Thompson, 4 Mad. 179. There are two books kept in the Six Clerks' office; the bills which are filed are entered in one of them, and of these the defendant must take notice. In the other are contained merely the titles of

It is a rule of Court that the Registrar shall not enter in his office any common rule or attachment issuing from the Six Clerks' office but by a note under the hand of the clerk who is the attorney in the cause, or his agent or deputy by him appointed, for whom he will answer. (*u*) And where an attachment for non-appearance was taken out before the bill was entered in a book kept in the Six Clerks' office, called the bill-book, though the bill had been filed in the Six Clerks' office, Lord Hardwicke seemed to think that it was irregular, and that an entry in the bill-book was necessary to give the party notice, private notice to the solicitor not being sufficient; but being uncertain as to the course of the Court, his Lordship *referred it to the Master. (*y*) It is, however, now settled that such an entry is *indispensably necessary*, to give the party notice, and that an attachment issued without such an entry would be discharged forthwith. (*z*) [*581]

This rule also extends to *amended bills*, and it has been decided that an amended bill is not considered to be on the file, for the purpose of an attachment, before an entry has been made of the amendment in the Six Clerk's book; and that there is not any difference in this respect between the amendment of a bill which has been answered and the amendment of a bill which has not been answered. (*a*)

According to the old orders of the Court, no process of contempt could have been made and sent to the Great Seal at the suit of any person prosecuting in *forma pauperis* until it had been signed by the Six Clerk who acted for him; but this is now altogether disused; (*b*) when, however, process is sued out by a pauper, the order for admission in *forma pauperis* ought to be produced in the office. (*c*)

An attachment is considered to be issued when it is delivered out by the sealer to the clerk in Court, and therefore where an attachment had been sealed and delivered out to the clerk in Court before the affidavit, upon which it was issued, had been filed, it was held to be irregular, although it was not parted with by the Clerk in Court till after the affidavit had been placed upon the file. (*d*)

By the standing orders of the Court, "every suitor who prosecuteth a contempt ought to do his best endeavour to procure each several process to be served and executed upon the party prosecuted; and upon his wilful default therein appearing to the Court, such person offending shall pay unto the party grieved good costs, and lose the benefit of the process returned without such endeavour. (*e*)

It is particularly necessary that this rule should be attended to in cases where it is intended to proceed to take a bill **pro confesso* against a defendant in contempt for want of an answer, under the 1 W. 4, c. 36, s. 15, by omitting the ancient process of attachment with proclamation, &c., pursuant to the first rule of that section; since it requires that a plaintiff applying for a sergeant-at-arms under that rule shall satisfy the Court, by affidavit of his solicitor or of his town agent, (if the attachment was issued by such agent) [*582]

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bills *which are not filed*, but on which some process has issued, and this latter is kept for the sake of defendants who may prefer costs, if they have entered an appearance. Belt's Supp. to Vezey, 42.

(*u*) Prac. Reg. 47.
(*z*) Belt, Supp. 42.
(*b*) Beam. Ord. 217.
(*d*) Gardner v. Rowe, 4 Russ. 578.
(*y*) Leman v. Newnham, 1 Ves. 51, 53.
(*a*) Adamson v. Blackstock, 1 S. & S. 118.
(*c*) 1 Harr. 330, *ante*, 46.
(*e*) Beam. Ord. 66, 199.

that due diligence was used to ascertain the place where the defendant was at the time of issuing such writ, and in endeavouring to apprehend the defendant under the same. (*f*)

The rule which requires due diligence to be used in executing an attachment may, however, be dispensed with in the instance of an infant defendant, in whose case, if no appearance is entered to the *subpœna*, an attachment, although sued out in the usual manner, is never executed, the plaintiff being at liberty, upon its being sealed, and before its return, to move for a messenger to bring the infant to the bar of the Court. (*g*)

The first thing to be done, after the writ has been issued, is to deliver it to *the sheriff* or other officer to whom it is directed; and it is to be observed, that although it is directed to the sheriff, it may be delivered to the under-sheriff, by whom all the duties of the sheriff which do not require his personal presence are usually executed. (*h*) The sheriff or other officer to whom any writ is directed or delivered ought with all speed and secrecy to execute such writ, (*i*) and neither he nor his officers can dispute the authority of the Court out of which it issues, but he or his officers are at their peril to execute the same according to the command of such writ. (*k*)

If the defendant is already in the custody of the sheriff either upon a criminal sentence or civil process, no further arrest is necessary, but the sheriff must give notice of the attachment to the jailer in whose custody the defendant is; and it is to be observed that a defendant in custody upon civil process against whom an attachment has been issued out of Chancery for a contempt, in not appearing [*583] or answering, cannot be discharged under an Insolvent Act without an *order of the Court of Chancery, and if under such circumstances the sheriff takes upon himself to discharge him he will be liable to commitment. (*l*)

The sheriff cannot, however, detain a prisoner in custody under an attachment out of the Court of Chancery beyond the period of thirty days from the time of his being actually in custody or detained (being already in custody) upon the process, unless the last of such thirty days shall happen out of Term, in which case the defendant may be detained till the expiration of the first four days of the ensuing Term; and if in the meantime the defendant is not before taken up to the bar of the Court to answer his contempt, the sheriff, jailer or keeper in whose custody he may be at the expiration of the above-mentioned time is bound to discharge him out of custody, without payment by him of the costs of the contempt, which are in that case to be paid by the party on whose behalf the process issued. (*m*)

Although all writs and processes are directed to the sheriffs of the different counties, yet they never execute the same themselves, but the under-sheriffs usually make their warrants to their bailiffs or officers for the execution of such writs; (*n*) and it is the duty of such bailiffs or other officers to execute such warrants according to their directions.

These warrants must be made according to the nature of the writ, and contain the substance thereof, and be made out in the high sheriff's name, and under the seal of office. (*o*)

(*f*) *Vide post*, "*Sergeant-at-Arms*," and "*taking bills pro confesso*."

(*g*) *Ante*, p. 230, and *vide post*, "*Messenger*."

(*h*) Impey, Off. Sheriff, 14. (*i*) Ibid. 45.

(*k*) Ibid. 33.

(*l*) Kendal v. Barron, cited 2 Dick. 661. The 2 W. 4, c. 58, provides for the discharge of persons committed for contempts of this nature, upon the application of the party committed, *vide post*.

(*m*) 1 W. 4 c. 36, s. 15, rule 4. (*n*) Impey, Off. Sheriff, 59.

(*o*) Ibid.

By the 6th of Geo. 1, no high sheriff, under-sheriff, their deputies or agents, shall make out any warrant before they have in their custody the writs upon which such warrants ought to issue, on forfeiture of 10*l.* And every warrant to be made out upon any writ out of the King's Bench, Common Pleas, or Exchequer, *before judgment*, to arrest any person, shall have the same day and year set down thereon, as shall be set down on the writ itself, under forfeiture of *10*l.*, to be paid by the person who shall fill up or deliver out such warrant. [*584]

By 2 Geo. 2, every warrant that shall be made out on any writ, process, or execution, shall, before the service or execution thereof, be *subscribed or indorsed with the name of the same attorney, clerk in Court, or solicitor*, by whom such process, &c. shall be sued forth. But the not subscribing or indorsing the name on any warrant made on any writ, &c. shall not vitiate the same; but such writ shall be valid and effectual, provided the writ whereon such warrant is made out be regularly subscribed or indorsed; and every sheriff or other officer who shall make out any warrant upon any writ, process or execution, and shall not subscribe or indorse the name of the attorney, clerk in Court, or solicitor, who sued out the same, shall forfeit 5*l.*, to be assessed as a fine by the Court out of which such writs, &c. shall issue; one moiety to His Majesty, and the other to the person aggrieved. (*p*)

The warrant must be had *before the arrest*, or the arrest will be illegal, and the party grieved may have his action for false imprisonment, and the Court will direct the bail-bond to be cancelled. (*q*)

If the writ be sued out of the Court of Chancery then the warrant must be,

"So that I may have his body before the King, in his Court of Chancery."

And if out of the Exchequer, then,

"Before the King's Barons of his Exchequer," &c.

The bailiff or officer to whom the warrant is directed and delivered ought, with all speed and secrecy, to execute the same according as it commands him, and he is bound to pursue the effect of his warrant; (*r*) and it is to be observed, that the bailiff of a hundred may execute a writ out of the hundred where he is bailiff, for he is bailiff all the county over. (*s*) It must, however, be within the county, for *the sheriff's bailiwick extends no further. (*t*) It seems that an arrest may be by the authority of the bailiff, though his be not the hand that arrests, nor in sight, nor within any *precise* distance of the defendant; it is sufficient that he is arrested. (*u*) [*585]

An arrest on a Sunday is absolutely void. (*w*) If, however, a defendant arrested on a Saturday escapes he may be re-taken on a Sunday, for that is not in execution of the process, but a continuance of the former imprisonment; (*x*) and it is said that a person may be arrested on a Sunday on the Lord Chancellor's warrant, or an order of commitment for contempt, for he is considered as in custody from the time of making the order, and the warrant is directed to the jailer as in the nature of an escape warrant, (*y*) (which is a warrant authorized under the 1 Ann. stat. 2, c. 6, s. 1, and 5 Ann. c. 9, s. 3, by which the judge of any Court out of which process has issued, by virtue of which a party has been committed to prison and escapes from such prison, may issue a warrant for his re-apprehension,) under which it has been held that a defendant

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(*p*) *See* 12 Geo. 2 c. 12, s. 4.
(*q*) 4 Bac. Abr. 452; Hall v. Roche 8, T. R. 187.
(*r*) Imp. Off. Sheriff, 45. (*s*) Ib. 46.
(*t*) Hammond v. Taylor, 3 B. & Ald. 408.
(*u*) Blatch v. Archer, Cowp, 65. (*w*) 29 Car. 2.
(*x*) Imp. Off. Sheriff, 61. (*y*) *Ex parte* Whitchurch, 1 Atk. 55.

may be re-taken on the Lord's-day. (z) It is to be observed, that the sheriff is not entitled to his fees from a party whom he has improperly arrested. (a)

The bailiff or other person to whom the execution of the process has been entrusted, must, as soon as he has executed the warrant, return it, together with his answer to the same, to the sheriff, so that he may be ready to certify to the Court how and in what manner the warrant has been executed when called upon. (b)

No arrest can take place under an attachment after the day of the return of the writ; (c) and if the return is allowed to expire before anything is done upon the writ, the plaintiff must sue out another attachment, but will in such case be allowed in costs but for one attachment. (d) This, however, must be understood as applying only to cases where the first *writ has not been [*586] delivered to the sheriff, for after delivery to the sheriff the duty of executing it lies upon him, and he must make his return to the Court accordingly. When a *subpœna* is returnable immediately, it is only in force till the last return of the following term, and if executed afterwards, the arrest will be irregular. (d)

It is to be observed, that a wife is not to be brought in upon process of contempt for not appearing, or for want of an answer, unless the husband be also taken and brought in with her, unless by special order of the Court. (e) Where, however, the wife has obtained an order to answer separately from her husband, she is liable to process of contempt as if she were a *feme sole*. (f)

A sheriff or other officer employed to make an arrest under an attachment cannot justify breaking doors in executing the process; and it is to be observed, that although the arrest is by a bailiff or other officer, it is considered as the act of the sheriff, who makes his return accordingly.

If the defendant is taken he must either go to prison for safe custody or put in bail to the sheriff, for the intent of the arrest being only to compel an appearance in Court at the return of the writ, that purpose is equally answered whether the sheriff detains his person or takes sufficient security for his appearance. (g) The sheriff may, however, if he pleases, let the defendant go at large without any sureties; but that is at his own peril, for after once taking him the sheriff is bound to keep him safely, so as to be forthcoming in Court. (h)

The method of putting in bail to the sheriff is by entering into a bond or obligation, with one or more sureties, to insure the defendant's appearance at the return of the writ, which obligation is called a *bail-bond*. (i) The statute 23 H. 6, c. 9, having prescribed in what cases the sheriff may take a bail-bond in actions emanating from courts of law, and prohibited the taking a bond in all other cases, a doubt appears *to have been raised whether the sheriff [*587] has or has not a right to take a bail-bond upon attachments issuing out of the Court of Chancery; but this question has been set at rest by the decision of the Court of Common Pleas in *Morris* v. *Hayward*, (l) by which it was determined that a sheriff may take a bail-bond on an attachment out of Chancery, but that he is not compellable to do so, and that whether a bail-bond shall be taken or not, is in the discretion of the sheriff, as regulated by the practice of that Court. The consequence is, that an action at law will not lie against

(z) Imp. Off. Sheriff, 61.
(a) In *re* Thomas, Law Journal, 1835, 32.
(b) Imp. Off. Sheriff, 46.
(c) Ibid. 59.
(d) 1 Harr. 110.
(d) 1 Smith, Ch. P. 84.
(e) Prac. Reg. 142, *Vide ante*, 579.
(f) *Vide ante*, 211.
(g) 3 Bl. Com. 290.
(h) Ibid.
(i) Ibid.
(l) 6 Taunt. 569.

the sheriff, under the above-mentioned statute, for refusing to take bail from a defendant arrested under an attachment issuing out of the Court of Chancery. (*m*)

The practice of the Court, however, seems to be, that where a party is taken up on an attachment for a contempt, he may, when the contempt is of a bailable nature, on payment of the costs, which are 13*s.* 8*d.*, be admitted to bail by entering into a bail-bond to the plaintiffs to the amount of 40*l.* himself, with two sureties in 20*l.* each, to appear or answer, as the case may be, at the return of the writ. (*n*)

It is to be observed, that a contempt in not paying costs or obeying an order or decree is not of a bailable nature, and that the sheriff cannot take bail to an attachment issued on the account. (*o*)

Where a sheriff, having taken a defendant into custody upon an attachment, takes bail for his appearance, he may assign the bail-bond to the plaintiff, (*p*) who, if the defendant neglects to appear, or to put in an answer, may put the bail-bond in suit against him. In the Court of Chancery the plaintiff may also have a messenger into the county where the defendant lives, to arrest the defendant, and bring up his person to the Court, which is the more effectual way of proceeding. (*q*) This, however, will not preclude him from bringing an action at the same time upon the bail-bond against the defendant and his sureties, otherwise the giving a bail-bond would be *quite useless; (*r*) and it is to be observed that if an action is brought on the bail-bond [*588] the defendant cannot obtain an order to restrain the defendant from proceeding in it without first clearing his contempt. (*s*)

Where a defendant has been arrested upon an attachment, and either sent to prison or been admitted to bail, the sheriff has obeyed the writ, and performed all that he is required to do. In this respect there is a difference between *a capias at law and an attachment.* "Upon a *cepi corpus* returned upon a *capias* at law they amerce the sheriff if he does not bring in the body, upon the statute of *Westminster*, 2, c. 29; and this is upon the words of the *capias*, which are, '*So that you have his body before us to answer* A. W. *of a plea of trespass upon the case.*' So that the command of the writ is not obeyed unless he hath the body ready. In an attachment the form of the writ is, '*So that you have his body before us to answer us, as well of a certain contempt by the aforesaid* A. B. *against us committed, as is said, as what shall be then and there alleged against him; and further, to do and receive whatever our said Court shall think proper in this behalf, and that you do by no means omit, and have here this writ.*' By which words, it should seem, they might amerce the sheriff for not bringing in the body, as they did upon the *capias* at common law; but because the writ was originally founded upon a *contempt*, it seems that where the sheriff has taken up the body he has paid obedience to the writ, though he does not actually bring him up to the Court; because the contempt only induces a commitment, which is satisfied by imprisonment in the county jail: and the statute of *Westminster* 2, only relates to original and judicial writs, and not to these prerogative processes, and therefore they issued an *habeas corpus*, which is an undoubted writ within the statute upon which it is proper to ground an amercement." (*t*)

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*All processes against any person, directed to the sheriff, ought to be duly and truly executed, and returned into the Courts out of [*589]

(*m*) Studd v. Acton, 1 H. Blackst. 468.
(*n*) Hind. 106.
(*o*) Anon. Prec. Chanc. 331.
(*p*) Anon. 2 Atk. 507.
(*q*) Ibid.
(*r*) Beddall v. Page, 2 Sim. 224.
(*s*) 1 Turn & V. 115.
(*t*) Gilb. Chan. 83.

which they issued; (u) and all returns, although made by the under-sheriff, yet must be made in the name of the high sheriff, and his name must be put thereto, or it is void. (x)

The sheriff must also return truly, and not contrary to the record; if he does, he falsifies all his proceedings. (y)

If the sheriff takes the party to jail he should lose no time in so doing, as otherwise the time may expire within which the plaintiff is bound to bring up the defendant to answer his contempt under 1 Will. 4, c. 36, s. 15, rule 4. (z)

The return ought to be made before or upon the day of return named in the writ, if a day certain is named; (a) but if the writ be returnable on a return day not certain, the sheriff need not return it till the *quarto post.* (b)

An attachment returnable *immediately* should be returned as soon as it is executed; but it is in force till the last return of the term following the *teste.* If executed after that time it is liable to be discharged for irregularity. (c) The party prosecuting the contempt, however, is at liberty to call upon the sheriff for his return to an attachment returnable immediately on the fifth day after it is put into the sheriff's hands. (d)

If the sheriff or other officer does not make his return of the writ directed to him, this Court may amerce him, and the amercements are commonly 5*l.*, and are to be levied by being estreated into the Exchequer, or by process out of the petty bag to the succeeding sheriff to levy and pay them into the hanaper, But it is usual to give the sheriff a day for that purpose, and if he do not by that time return the writ, the Court will set the amercement. (e)

The general course of proceeding, however, to compel the sheriff to return an attachment is first to procure an order upon *the sheriff to make the return; then a second order that he return it within a given time, or stand committed; and after that a third order that he do stand committed. (f) [*590]

Where an attachment has been issued to the Chancellor of the county palatine of Lancaster, and he omits to return the writ, a peremptory order must be made upon him to return it within a certain number of days after service of the order. Upon which, if he returns 'that he hath sent his mandate to the sheriff, who hath not returned the same,' another peremptory order will be issued to the sheriff, commanding him within a certain number of days after service of the order upon his under-sheriff to return the mandate. (g)

Upon an attachment there are two ordinary returns: if the defendant cannot be arrested, the sheriff returns that A. B. is not found within his bailiwick; this is termed a *non est inventus*, and upon this return attachment with proclamations and further process of contempt is grounded. The other return is, "I have attached the within named A. B. as within I am commanded," and it is called a return of *cepi corpus*, which when once returned, puts an end to all the ordinary process, for no proclamation or commission of rebellion can be issued after that; (h) unless the defendant afterwards escapes or absconds, in which case, as we shall hereafter see, the sergeant-at-arms may be sent for the purpose of grounding a sequestration.

(u) Imp. Off. Sheriff, 333.
(y) Ibid.
(a) Imp. Off. Sher. 334.
(c) 1 Smith, Ch. Prac. 84.
(e) 1 Harr. 118.
(g) Ibid. 558.
(h) Frederick v. David, 1 Vern. 344; Hind. 100.
(x) Ibid. 334.
(z) 1 Smith, Ch. P. 100.
(b) Makepeace v. Dillon, ibid 363.
(d) Ibid 100.
(f) Clough v. Cross, 2 Dick. 555, 557.

When the sheriff returns *cepi corpus*, if the defendant is not otherwise charged, and he hath taken a bail-bond for his appearance, he adds that "*he hath the defendant ready;*" (*i*) but if the defendant be in prison, and is not out on bail-bond, the sheriff adds to his return "*that he hath the defendant in his safe custody, in His Majesty's jail for his county,*" &c. (*k*)

It is to be noticed that if the writ is directed to the Chancellor of Lancaster commanding him to issue his mandate to *his sheriff to attach the party, the return is, that he has issued his mandate according to the [*591] terms of the writ, and that the sheriff has made the return to him either of *cepi corpus* or *non est inventus*, as the case may be.

It seems that when a defendant is in prison upon a criminal charge, the sheriff ought to make a special return of the circumstance; and where an attachment has been issued against a person of unsound mind, the sheriff ought specially to return that fact, and then if no one be willing to appear for the defendant, the plaintiff may move upon the sheriff's return, and on affidavit of the defendant's state of mind, that the senior clerk, not towards the cause, may appear for him. (*l*)

The costs of an attachment issued, but not executed, are 11*s.* 2*d:* if executed, 13*s.* 8*d.* (*m*)

SECTION III.

Of the Writ of Habeas Corpus.

If the sheriff returns a *cepi corpus*, and *that he has the defendant in safe custody in His Majesty's jail*, &c., the next step to be taken, if it is wished to proceed to a sequestration against his estate and effects, or to take the bill *pro confesso* against him, is to sue out a writ of *habeas corpus*, (*n*) which is a writ directed to the sheriff or other officer in whose custody he is, commanding him to bring before the Court, on a certain day, the body of the defendant, in order that he may abide such order as the Court may make.

The prisoner, also, if he wishes to be brought up to the Court, may sue out a *habeas corpus* himself. (*p*)

It seems that formerly, in the Court of Chancery, the plaintiff might, if he pleased, instead of a *habeas corpus*, move that the sheriff might bring in the body, which if not *done forthwith, the sheriff was ordered to pay [*592] costs; (*q*) and in the Exchequer it appears to be the present practice to give a four-day rule upon the sheriff to bring in the body, and then, if the sheriff does not comply within the four days, to award a messenger, upon motion, instead of a *habeas corpus*. (*r*) This however is a particular privilege of the Court of Exchequer, in order that the plaintiff (who is presumed to be the King's debtor) may not be delayed; (*s*) but in the Court of Chancery a messenger is never sent when the defendant is in actual custody either at the time of the return, or has been subsequently committed and charged at the suit of others, (*t*) in which last case the messenger, if he has been already sent, must procure the sheriff to make a return of the defendant's subsequent committal, upon which a *habeas corpus* will be issued. (*u*)

(*i*) Johnson v. Aylet, 2 Dick. 658.
(*k*) Ibid.
(*l*) 1 Smith, Ch. Prac. 124.
(*m*) Ibid 130.
(*n*) Gilb. For. Rom. *ante*.
(*o*) Johnson v. Aylet, 2 Dick. 658.
(*p*) 1 Harr. 124.
(*q*) Anon. 2 P. Wms. 300.
(*r*) Gilb. For. Rom. 71, 1 Fowl. 133. 4.
(*s*) Gilb. For. Rom. 71.
(*t*) Johnson v. Aylet, 2 Dick. 658.
(*u*) Ibid.

But although a *habeas corpus* is the proper course of proceeding where the defendant is in actual custody, yet where he is not in such custody, but has been admitted to bail, a *habeas corpus* will be improper, and the messenger of the Court ought, in such case, to be sent to bring him up to the bar. (*x*)

It was formerly not considered necessary, unless, it was intended to proceed to take the bill *pro confesso* against the defendant, to bring him up to the bar of the Court, he being sufficiently charged with the contempt, in the prison below, by the delivery of the attachment to the sheriff. (*y*) It having been found, however, that the circumstance, of there being no obligation upon the person sending the party to prison ever afterwards to take the slightest notice of him, had frequently led to the consequence that a defendant committed to a county jail was left there for the remainder of his life, a clause was introduced into the statute [*593] 1 W. 4, c. 36, (Sir Edward Sugden's Act,) (*z*) by which it is provided that *if a defendant under process of contempt for not appearing or not answering, be in actual custody, and shall not have been sooner brought to the bar of the Court under process to answer his contempt, the plaintiff, if the contempt be not sooner cleared, shall bring the defendant by an *habeas corpus* to the bar of the Court, within thirty days from the time of his being actually in custody or detained (being already in custody) upon process of contempt, and if the last of such thirty days shall happen out of Term, then within the first four days of the ensuing Term; and that in case any such defendant shall not be brought to the bar of the Court within such respective times aforesaid, the sheriff, jailer or keeper, &c., in whose custody he shall be, shall thereupon discharge him out of custody without payment by him of the costs of contempt, which shall be payable by the party on whose behalf the process issued." (*a*)

The effect of this rule is to discharge the defendant out of any custody which he may be in or detainer he may be under for contempt in not appearing or not answering, unless he is brought to the bar of the Court within the time therein limited. The plaintiff, therefore, if he wishes to keep a defendant who has been attached and committed to the county jail for contempt in process in custody till he has cleared his contempt, must sue out a writ of *habeas corpus* in sufficient time to have the defendant brought up to the bar within the period mentioned in the rule. It is not, however, now necessary, as it formerly was under the 5 Geo. 2, c. 25, s. 2, in order to enable the Court to cause an appearance to be entered for the defendant, actually to bring him to the bar by *habeas corpus*, that proceeding being now rendered unnecessary by the stat. 1 W. 4, c. 36, s. 11, which after re-enacting the section of the 5 G. 2, c. 25, s. 2, before referred to, goes on to enact "that if any defendant, being within the walls of any prison in England, under or charged with an attachment or other process of contempt, shall after fourteen days' previous notice in writing, requiring him to enter an appearance, refuse or neglect to enter his appearance [*594] according to the *rules or method required by the Court, or to appoint a clerk or attorney of the Court to act on his behalf, the Court may appoint a clerk in Court or attorney of such Court to enter an appearance for such defendant, and such proceedings may thereupon be had in the cause as if the party had actually appeared." (*b*)

It is to be observed, that when it is intended to take a bill *pro confesso* against a defendant who is in prison for a contempt in not appearing, under the 13th rule of the 1 W. 4, c. 36, s. 15, the defendant is to be allowed twenty-one days after his committal to prison, or being charged with the attachment, to

(*x*) Holmes v. Cardwell, 3 Mad. 114.
(*y*) Johnson v. Aylet, 2 Dick, 658.
(*z*) Sugden's Acts, by Jemmett, 3.
(*a*) 1 W. 4, c. 36, s. 15, rule 5.
(*b*) *Vide* Cha. Rep. 40, prop. 7.

consider whether he will enter his appearance or not, after which the plaintiff must proceed to enter an appearance for him within fourteen days, otherwise he will be discharged; so that the notice to be given pursuant to this rule should be so given that the fourteen days shall expire within fourteen days after the expiration of the twenty-one days. It should also expire within the period limited, by the 5th rule, as the time beyond which a defendant cannot be detained in prison without being brought to the bar by *habeas* pursuant to that rule.

This clause appears to have been introduced into the Act in consequence of a suggestion of the Commissioners, in order to save the expense of bringing the defendant to the bar of the Court by *habeas corpus*, which in some cases is considerable. (c) It is to be observed, however, that if it is intended to detain the defendant in custody till he has cleared his contempt, by payment of his costs, he must still be brought up to the bar of the Court by *habeas corpus*, otherwise he will be entitled to his discharge, under the 5th rule before referred to, (d) or under the 13th rule of the 15th section, by which the Court is empowered, upon application of the defendant, in default of the plaintiff's proceeding to enter an appearance for the defendant, or to take the bill *pro confesso* against him within certain periods *in the rule mentioned, to discharge the defendant out of custody without paying the costs of the contempt, unless the Court, being satisfied that justice cannot be done to the plaintiff without an answer to the bill, or to interrogatories from the defendant himself, order him to remain in custody until answer or further order. (e) [*595]

It seems to have been the opinion of Lord Loughborough, in *Rogers* v. *Kirkpatrick*, (f) that a defendant who was in confinement under sentence for felony could not be brought up to the bar of this Court by *habeas corpus* for want of an answer; but in *Moss* v. *Brown*, (g) a prisoner in Newgate, suffering under the sentence of the Court of King's Bench upon an indictment for perjury, appears to have been brought up upon an attachment for want of an answer. In such case, however, the defendant will not, as in ordinary cases, be turned over to the *Fleet prison cum causis*, but an order will be made that he shall be turned over to the Fleet prison *pro forma*, and from thence carried back *instanter* to the prison from whence he came, with his cause. (h) And this appears to have been also the course of proceeding where the defendant was in prison for a misdemeanor. (i) It is to be observed, however, that where a defendant in contempt for want of an answer was in custody for a criminal offence, very little advantage could, under the old practice, be derived to the plaintiff by bringing him up to the Court by *habeas corpus* and having him committed to the Fleet *pro forma*, because by so doing he could not have been in a better situation for proceeding to take the bill *pro confesso* against him than he was in before, inasmuch as an *alias habeas corpus* (which was the first process issued against a prisoner who had been turned over to the Fleet, in order to found an order to take the bill *pro confesso* against him) could not issue except to the prison of the Court. (k) This inconvenience has, however, been recently *remedied, in cases where the defendant is in custody for a misdemeanor, by the stat. 1 W. 4, c. 36, s. 15, rule 4, by which it is provided "that where a defendant is confined for a misdemeanor and has been brought before the Court upon an *habeas corpus*, and thereupon turned [*596]

(c) Cha. Rep. 39, prop. 5; Expl. Pap. ibid. 69, prop. 5.
(d) *Supra*.
(e) *Vide post*, sect. 11, & chap. 9.
(f) 3 Ves. 573.
(g) 1 V. & B. 78.
(h) Ibid.
(i) Bowes v. Strathmore, 2 Dick. 711.
(k) Lloyd v. Passingham, 15 Ves. 179; Moss v. Brown 1, V. & B. 306. Where a defendant is in contempt for not obeying an order or a decree, the committal to the Fleet *pro forma* is sufficient to ground a sequestration against him. *Vide post*, "Decrees."

over to the Fleet *pro forma*, but has been carried back to the prison from whence he came with his cause, another writ of *habeas corpus* may issue, directed to the jailer or keeper of the prison to which he has been carried back, and thereupon the defendant shall be brought into Court and remanded to the prison from whence he came with his cause, without being turned over again to the Fleet prison, and the bill may be taken *pro confesso*, in the same manner in all respects as if the defendant had been all along in the custody of the Fleet."

It is to be observed, that this rule does not apply to cases where the defendant is in custody for a felony, consequently the same difficulty which existed before in applying this process to criminal cases in general, still remains with regard to persons charged with felonies. (*l*)

It is generally necessary before a *habeas corpus* can be issued on the part of the plaintiff to wait till after the return of the attachment, unless the defendant is already in custody in the Fleet, in which case it may be moved for upon the attachment being entered, without waiting for the return; (*m*) and so where a defendant is in the custody of the Marshal of the King's Bench prison, the plaintiff may, immediately after lodging the attachment with the Marshal, move for a *habeas corpus cum causis*. (*n*)

It has been before stated that the prisoner as well as the plaintiff may have a writ of *habeas corpus* to bring him to the bar of the Court. In either case, however, it is necessary to have a previous order of the Court for writ, which will be made of course upon application, either by motion or petition, on producing the attachment and the return. (*o*)

The order having been obtained, it is prepared by the clerk in Court, and [*597] left open, with the order annexed to it, with *the bag-bearer of the Six Clerks' office, who procures the signature of the Lord Chancellor to it, and, after it is sealed, leaves it at the clerk's seat; the costs are 14*s.* 2*d.*

The service is by delivering the writ itself under seal to the sheriff or other person in whose custody the defendant is, and keeping a copy of the label; and if he obey it not, the Court will punish him in a summary way, upon motion. (*p*)

The sheriff is bound not only to return the writ, but he must also have the defendant at the bar of the Court by the time appointed, for which purpose he usually executes a warrant under his hand and seal to the jailer in whose custody the defendant is, commanding him to have the body before the Court, &c. (*q*)

Formerly, if the sheriff or other officer to whom the writ was directed obeyed it not, the course was to issue an *alias habeas corpus*, and then a *pluries habeas corpus*, and, afterward, an *alias pluries*, to which if he yielded no obedience, nor made some return thereupon, in excuse, which the Court should think sufficient, then the Court proceeded to punish his contempt.

This method of proceeding by *alias* and *pluries* has, however, gone into disuse in almost all cases, and the process by attachment has been substituted in its stead. It has been long settled, at common law, that if the sheriff or other officer to whom a *habeas corpus* is directed, omit to make a return, or make an insufficient return, an attachment may be issued against him for his disobedience to the original writ without issuing an *alias* or *pluries habeas corpus*; (*r*) and as that practice stands upon this legal principle, viz: that disobeying the

(*l*) *Vide* Moss v. Brown, *ubi supra*.
(*n*) Trotter v. Trotter, Jac. 533.
(*p*) Hind. 113.
(*r*) Rex. v. Winton, 5 T. R. 89.
(*m*) Curs. Can. 114.
(*o*) Hind. 113.
(*q*) Imp. Off. Sher. 405.

King's writ is a contempt, and equally a contempt to disobey the first writ as at last, (*s*) the same principle has been applied to writs issuing out of the Court of Chancery as well as to those issued by courts of law. (*t*)

Where a *cepi corpus* had been returned to an attachment upon which a *habeas corpus cum causis* was issued *to bring the defendant to the bar of the Court to answer his contempt, but the officer to whom [*598] it was addressed, after he had received the writ, discharged the defendant under an Insolvent Act, Lord Hardwicke declared him guilty of a contempt in discharging the defendant before he had cleared his contempt, and ordered the officer to stand committed unless he showed cause to the contrary, which order was subsequently made absolute. (*u*)

If a defendant, after being arrested upon an attachment, is let out upon bail, and a *habeas corpus* is subsequently issued, the sheriff may return that "the defendant is not, and was not at the time of issuing the writ, nor hath been since in his custody," whereupon the *habeas corpus* will be treated as a nullity, and a messenger will be sent to bring the defendant in. (*x*)

The sheriff may also return that the defendant is *languidus*, and that he cannot have the body without danger and peril of his life; (*y*) and it is a good return to a *habeas corpus cum causis* that the party is dead. (*z*)

It seems that when a sheriff returns a *cepi corpus*, but that the defendant is in such a weak state that he cannot be removed, the proper course is to move for a messenger. (*a*)

According to the old practice of the Court, when a prisoner was brought in upon the ordinary writ of *habeas corpus* issuing out of this Court, and it appeared upon reading the return that he was in custody, or detained in execution upon some other process, he must have been remanded to the prison from whence he was brought. (*b*)

The plaintiff might, however, in such case, move the Court for a *habeas corpus cum causis*, and then the prisoner being brought up by such writ, the Court would order him to be turned over to the Fleet prison "with his causes," which had the effect of charging him with such other matters as he was before charged with in the prison from whence he came, as *well as with [*599] the order or decree of this Court, whereby he is turned over. (*c*)

The present practice of the Court, however, is to issue a *habeas corpus cum causis* in the first instance.

The form of the writ is as follows:

"William the Fourth, &c. To the sheriff of, &c., greeting. We command you that you do on the day of bring before us, into our Court of Chancery, wheresoever it shall then be, the body of by whatsoever name or addition of names he is called or known, who is detained in our said prison in your custody, (*together with an account of the cause or causes of his being taken into and detained in custody*) (*d*) to perform and abide such order as our Court shall make in this behalf; and hereof fail not, and bring this writ with you. Witness ourself at *Westminster*," &c.

This writ must be indorsed with the words, "*pursuant to stat.* 31 *Car.* 2."

It is to be observed, that if a defendant be brought up from a county prison by *habeas corpus cum causis*, (which is the only method of removing him if there be other detainers against him,) every subsequent writ of *habeas corpus*

(*s*) Ibid.
(*t*) Crowley's case, 2 Swanst. 1. 73.
(*u*) Kendal v. Baron, 1 Dick. 89.
(*x*) Holme v. Cardwell, 3 Mad. 114.
(*y*) Impey, Off. Sher., 407.
(*z*) Ibid. 406.
(*a*) Miles v. Lingham, 7 Ves. 230. *Vide etiam post*, "Messenger."
(*b*) 1 Harr. 125.
(*c*) 1 Harr. 125.
(*d*) The words in italics are only inserted in a *habeas corpus cum causis*.

to the Warden of the Fleet to bring the defendant to the bar of the Court must be *cum causis.* (*e*)

The defendant being brought up from the county jail by virtue of this writ, together with his causes of commitment, the Court usually orders him to be turned over to the Fleet prison, where he will remain charged as well with the detainers lodged against him below, as also until he comply with the order of the Court, (*f*) unless his committal to the county jail has been for a criminal offence, in which case, as we have seen, he will only be turned over to the Fleet *pro forma*, and will be immediately removed thence to the county jail, with the cause of his committal to the Fleet. (*g*)

[*600] *By the 1 W. 4, c. 36, rule 6, it is provided, that if a defendant, upon being brought before the Court upon an *habeas corpus*, shall make oath, (which oath shall be administered to him by the registrar, and he shall be examined by him in open Court) that he is unable, by reason of poverty, to employ a solicitor to put in his answer, the Court shall thereupon refer it to the Master in rotation to inquire into the truth of that allegation, and to report thereon to the Court forthwith, and thereupon the Court may make such order as upon other reports of the like nature are thereinafter contained; that is, the Court will assign him a solicitor and counsel. (*h*)

By the ninth rule it is further provided, that if it shall appear to the satisfaction of the Court that any such prisoner is idiot or lunatic, or of unsound mind, although no commission has been issued, the Court shall appoint a guardian to put in his answer and discharge the defendant, providing for the costs in any of the ways pointed out by the Act as shall seem just; and if the Court shall see fit, the defence may be made by such guardian in *forma pauperis.* (*i*)

If a defendant is brought up by *habeas corpus* the costs are not fixed, but must be taxed. (*k*)

SECTION IV.

Of the Messenger.

When the sheriff returns to the attachment *cepi corpus*, and "that he hath the defendant ready," which, as we have seen, is the return he always makes when he has taken a bail-bond for the defendant's appearance; (*l*) the Court will, if *the defendant does not enter his appearance and clear his contempt by the return of the writ, direct the messenger in attendance upon the Court to bring the defendant to the bar of the Court to answer for his contempt, &c. [*601]

It appears to have been formerly the practice, in cases of this nature, for the Court to make an order upon the sheriff to bring in the body by a certain day,

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(*e*) Hind. 111. (*f*) Hind. 112.

(*g*) For the subsequent course of proceeding, where the defendant is poor or an idiot or lunatic, or where it is intended to take a bill *pro confesso* against a defendant, *vide post.* The sheriff or jailer, &c., to whom the writ is directed is bound to bring up the prisoner at the day mentioned in the writ, and it is no excuse for not obeying the writ that the fees due to the jailer were not tendered to him, but if the jailer bring up the prisoner by virtue of such *habeas corpus*, the Court will not turn him over till the jailer has been paid all his fees. 2 Jon. 178; Keb. 272, 280; 2 Show. 172. pl. 165.

(*h*) Sugden's Acts, by Jemmett, 67. (*i*) Ibid. 69.

(*k*) 1 Smith, 131. (*l*) Johnson v. Aylet, 2 Dick. 658.

and if he did not comply with such order, then to amerce him, and to send a messenger to take the defendant into custody and bring him up to the Court; and this appears to be still the practice of the Court of Exchequer. (*m*)

In the Court of Chancery, however, the practice of making a previous order upon the sheriff has been discontinued, and a messenger is sent immediately upon the return *cepi corpus* being made to the attachment. (*n*) It is said that "this practice was originally confined to those cases where the attachment was directed to the sheriff of London and Middlesex, or of Bristol, or any other corporation having the grant of fines and amercements, as London (*o*) and Bristol have, because in such cases, as the estreats and amercements went to the sheriffs themselves, the Court could not with effect amerce the sheriff, and there was no other way left to do justice to the plaintiff but by ordering the defendant to be taken into custody by the Court's own officer." (*p*) Now, however, the rule is to send a messenger into every county without distinction; and where a sheriff having taken a defendant into custody upon an attachment took a bail-bond for his appearance, which he delivered to the plaintiff, who obtained a rule *nisi* for the sheriff to bring in the body, Lord Hardwicke, upon the sheriff showing for cause that he had delivered the bail-bond to the plaintiff, and that he had not the custody of the body, discharged the rule, because, he said, the plaintiff might have a messenger into the county where the person lived, which was a motion of course upon a *cepi corpus* returned, though formerly the Court allowed the messenger to go to those particular *jurisdictions only [*602] where the sheriffs had the amercements themselves. (*q*)

A messenger, however, can only be sent when the sheriff has parted with the body of the prisoner, and taken bail for his appearance. (*r*) In cases where he holds the prisoner in close custody the Court will not grant a messenger, but will either order the sheriff to bring in the body or else a *habeas corpus* must issue. (*s*)

Where, however, the sheriff returned *cepi corpus*, but that by reason of the weak state of the defendant's health and her extreme infirmity, and the peril of her life, he had not removed her, a messenger was sent. (*t*)

It seems that the messenger is comparatively a new officer of the Court, (*u*) and that a sequestration cannot be awarded upon any return made by him; where, therefore, it appears likely that the messenger will fail in capturing the defendant, the Court, instead of awarding a messenger upon a *cepi corpus*, will send the sergeant-at-arms, (upon whose return of *non inventus* only can a sequestration be issued,) (*w*) in order that upon his return a sequestration may be awarded; thus, where after *cepi corpus* returned to an attachment the defendant absconded to Holland to avoid the plaintiff's demand, the Court, upon affidavit of that fact, directed the sergeant-at-arms to bring the defendant into the Court instead of the messenger, (*x*) and upon the return of the sergeant granted

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(*m*) 1 Fowler, E. P. 133.
(*n*) Anon. 2 Atk. 507.
(*o*) *Sed vide* Anon. 1 Vern. 116.
(*p*) Gilb. For. Rom. 70; Gibbs v. Cotton. 1 Vern. 154.
(*q*) Anon. 3 Atk. 507.
(*r*) Holme v. Cardwell, 3 Mad. 114.
(*s*) 2 P. Wms. 300.
(*t*) Miles v. Lingham, 7 Ves. 230.
(*u*) It is stated in the books of practice that the messenger is one of the deputies of the sergeant-at-arms; it appears, however, that this is not correct, and that the messenger is a distinct officer, having peculiar duties, and receiving his appointment from the Lord Chamberlain, (*vide* Ch. Rep. Appx. 330) whereas the sergeant-at-arms is appointed by letters patent from the Crown.
(*w*) Beames, Ord. 322.
(*x*) Frederick v. David, 1 Vern. 344. The words of the order in this case were: "The Court being informed that by the practice of this Court a sequestration might be awarded upon a return of a sergeant-at-arms, but that it was not known that any was ever granted

[*603] a sequestration. And in another case where a messenger was *ordered to bring the defendant to the bar of the Court, and he returned that the defendant could not be found, the sergeant-at-arms was ordered to go; (x) and so where a messenger who had been sent to bring up an infant defendant, was unable to find him, the Court directed the sergeant-at-arms to go; (y) and, in another case, where the messenger who had been sent died before he had executed his warrant, the sergeant-at-arms was substituted and sent in his stead. (z)

An order for a messenger is obtained by motion, upon production of the attachment, and of the sheriff's return of *cepi corpus* thereto, and is granted of course. (a)

As soon as the order has been drawn up, passed and entered, it must be delivered to the messenger of the Court, who, upon receipt of the order, must obtain the Lord Chancellor's warrant to take the defendant. (b)

The messenger of the Court usually executes this warrant by a deputy appointed for the occasion, (c) and his remuneration is 6*s.* 8*d.* per diem for the time he is out, and 6*d.* per mile for the distance he has to travel. The fees of the sergeant-at-arms are double. (d)

If the messenger cannot find the defendant, he must make a return of *non est inventus* upon the warrant, whereupon, as we have seen, the sergeant-at-arms will be ordered to go. (e) If he finds that since the sheriff's return to the attachment the defendant has been committed to prison upon another charge, at the suit of others, and that the sheriff upon that ground refuses to deliver him up to the messenger, he must procure a return to that effect from the sheriff, (f) [*604] and upon the sheriff's making such return a *habeas corpus cum causis* *may be issued, to the sheriff, to bring the defendant to the bar of the Court, with the causes of his committal. (g) It is to be observed, when the defendant has been taken into custody by the messenger, he generally gives notice of that fact to the plaintiff's solicitor, and keeps the defendant in custody till the plaintiff's solicitor requires him to be brought up. (h) The statute 1 W. 4, c. 36, however, requires that when a defendant has been taken by the messenger he must be brought up to the bar of the Court within ten days of his being taken into custody, unless the last of such ten days shall happen out of Term, in which case he must be brought up within the first four days of the ensuing Term; and in case any defendant shall not be brought to the bar within such period, the messenger, in whose custody he is, is bound thereupon to discharge him out of custody, without payment by him of the

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upon the return of a messenger, and that the messenger is but a new officer, but that the sergeant-at-arms may as well go as a messenger, *it is ordered*, that the sergeant-at-arms attending this Court do apprehend the said defendants, and bring them into this Court to answer the said contempt." Reg. Lib. 1685, A. fo. 583.

(x) Sambroke v. Ekins, 1 Dick. 68; Wilkinson v. Belcher, 2 Bro. C. C. 181.

(y) Steed v. Calley, Law J. 1835, 1.

(z) M'Nab v. Mensall, 2 Sim. 16. Where a messenger having a defendant in his custody under an attachment thinks proper to let him go at large upon his own undertaking to pay the costs, he will not be permitted to use the process of the Court to compel payment of the costs, but must bring an action. Jenkins v. Sandys, Jac. 233.

(a) Hind. 101. (b) 1 T. & Ven. 116.

(c) Report of Commissioners, App. A. p. 330.

(d) Ibid.

(e) Wilkinson v. Belcher, 2 Bro. C. C. 181.

(f) Johnson v. Aylet, 2 Dick. 658. It seems from this case that a return by the messenger himself to this effect would not be sufficient to found an order for a *habeas corpus cum causis*, but that the sheriff himself must make the return. *Sed qu.*

(g) Johnson v. Aylet, *ubi supra.* (h) Cha. Rep. App. X. 330.

costs of contempt, which are in such cases payable by the party on whose behalf the process issued. (*i*)

When a defendant is brought up to the bar of the Court by the messenger, he will be committed *to the Fleet prison* till he clears his contempt; the Court may, however, if his contempt is for non-appearance, appoint a clerk in Court or attorney of the Court to enter an appearance for him. (*k*)

When he has cleared his contempt he may, upon application to the Court, either by motion or petition, be discharged; and if after conformity and payment of the costs, or tender and refusal thereof, any further prosecution shall be had of the same contempt, the party prosecuted shall be discharged, with his costs. (*l*)

For the course of proceeding where the party brought up is too poor to put in an answer, or appears to be idiot or lunatic or of unsound mind, the reader is referred to the preceding Section. (*m*)

If a defendant is taken by a messenger, the costs are not fixed, but taxed costs. (*n*)

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*SECTION V. [*605]

Of Attachment with Proclamations.

If an attachment has been issued to compel the appearance of a defendant, and the sheriff makes a return to it of *non est inventus*, the next process which issues to enforce the obedience of the defendant is a writ directed to the sheriff, commanding him *to cause public proclamation to be made in all places within his bailiwick, as well within liberties as without, calling upon the defendant, upon his allegiance, personally to make his appearance in the Court of Chancery, but nevertheless in the meantime, if he can find the defendant, to attach him, so as to have him in Court, &c.*

This writ is called an *attachment with proclamations*, and has been adopted in imitation of the process in criminal cases, in which, upon a *non est inventus* returned to *a capias*, the party is proclaimed, and if he does not come in upon the proclamation, is declared to be an *outlaw;* and so in Chancery if the sheriff upon an *attachment*, which answers to the *capias*, returns *non est inventus*, the defendant is proclaimed, and if he does not come in upon the proclamation then he is deemed a *rebel*, and a commission of rebellion, which is the next process, issues. (*o*)

According to the old practice of the Court, a writ of attachment with proclamations was issued in all cases where the return to the original attachment was *non est inventus*, as well where the defendant had appeared but omitted to answer within due time after appearance, as where he had not appeared; but by the 1 W. 4, c. 36, s. 15, rule 1, it has been enacted, that "when a writ of attachment shall have duly issued against any defendant for *a contempt in not answering the bill*, and such defendant shall not have been taken under such writ, and the sheriff of the county into which such writ shall have issued shall make a return of *non est inventus* *to the same, the Court shall, upon motion by or on behalf of the plaintiff (notice of which shall [*606]

(*i*) 1 W. 4, c. 36, s. 15, rule 5.
(*l*) Ibid.
(*n*) 1 Smith, 131.
(*k*) Ibid, sec. 11.
(*m*) *Ante*, " "
(*o*) Gilb. For. Rom. 73.

not be required,) order that the sergeant-at-arms attending the Court do apprehend such defendant and bring him to the bar of the Court to answer his contempt, and the same proceedings may thereupon be had as if such order had been made in the manner theretofore in use."

This rule was framed in conformity with the suggestions of the Commissioners for inquiring into the practice of the Court, by which it was proposed that, in order to shorten the process for compelling an answer, the plaintiff might be at liberty, upon the return of a *non est inventus* to an attachment for want of an answer, to pass by the intermediate process of contempt and to move at once for a sergeant-at-arms. (*p*) It is to be observed, however, that the rule provides that "before such an order can in any such case be made, the plaintiff applying for the same shall be required to satisfy the Court, by the affidavit of the solicitor of the plaintiff (or of his town agent, if the writ of attachment was issued by such town agent,) that due diligence was used to ascertain the place where such defendant was at the time of issuing such writ, and in endeavouring to apprehend the defendant under the same, and that the person suing forth such writ verily believed at the time of suing forth the same that such defendant was in the county into which such writ was issued." (*q*) It is presumed, therefore, that when the defendant is not in a situation to make the affidavit required by this rule, he must, if he wishes to have the bill taken *pro confesso* against the defendant, adopt the old practice of suing out a writ of attachment with proclamations, in the same manner that is still adopted in cases of contempts for want of appearance.

An attachment with proclamations, like a first attachment, issues without [*607] order, (*r*) unless where it is against a defendant *residing in such parts of the United Kingdom of Great Britain or of Ireland as are not within the jurisdiction of the Court, or in the Isle of Man, under the stat. 2. W. 4, c. 33, (*s*) and 4 & 5 W. 4, c. 82, (*t*) in which case a previous order must be obtained. (*u*)

The writ of attachment with proclamations is nearly in the same form as the ordinary attachment, with the exception of the introduction of the command to the sheriff to cause the defendant to be proclaimed in the manner before specified. (*x*) According to the old practice of the Court, where it was intended to proceed to a sequestration, there must have been *fifteen* days between the *teste* and the return of the writ, unless an order had been obtained to make the several processes in the cause returnable immediately, which might have been obtained in all cases where the defendant resided within ten miles of London; but now the practice is regulated by the 1 W. 4, c. 36, s. 15, rule 3, which has been before discussed in treating of attachments, and which applies to all the writs in process of contempt as well as to attachments. (*y*)

In order to obtain this writ, the attachment with the return *non est inventus* indorsed thereon, must be left with the clerk in Court, who will thereupon make out the writ, and leave it with the bag-bearer of the Six Clerks' office, who will get it sealed. (*z*)

(*p*) Report 39, prop. 6. For the course of proceeding under this rule, *vide post*, sect. "Sergeant-at-arms."

(*q*) 1 W. 4, c. 36, rule 1. *Vide post*, sect. "Sergeant-at-arms."

(*r*) Gilb. For. Rom. 81. Edwards v. Pool, 2 Dick. 693.

(*s*) *Ante*, 277. (*t*) *Ante*, 279.

(*u*) Where a defendant has been already served with a *subpœna* under the above Acts, an order for an attachment cannot be obtained unless upon motion, of which personal notice has been given to the defendant. Hasluck v. Stewart, 6 Sim. 321, *ante*.

(*x*) Hind. 114. (*y*) *Vide ante*.

(*z*) Hind. 113.

The writ must be indorsed, "*By the Court, for not appearing*," (not answering,) &c., with the name of the clerk in Court who sues it out; and the surname of the Master of the Rolls and of the Six Clerk in whose division the writ is made out should also be subscribed. (*a*)

It must then be entered with the Registrar, in the same manner as an attachment, and when it is sealed the bag-bearer leaves it at the seat of the clerk in Court, who sends it *to the solicitor, who must forward it to the [*608] sheriff or other officer to whom it is directed. (*b*)

A sheriff cannot justify breaking doors in executing this process, though the commissioner in executing a writ of rebellion may. (*c*)

If the sheriff cannot succeed in taking the defendant under the writ of attachment with proclamations, he must make the following return:

"*By virtue of this writ to me directed, I have caused public proclamation to be made within my bailiwick that the within named A. B. do appear on the day and at the place within written, as within I am commanded; and I further certify that the within named A. B. is not found in my bailiwick.*" (*d*)

If the defendant comes in upon the proclamations, or is arrested under the attachment, the sheriff may either admit him to bail or send him to prison as upon a first attachment, in which case the return is *cepi corpus*, &c.

The proceedings upon the return of a writ of attachment with proclamations are the same, *mutatis mutandis*, with those upon the first attachment. It is to be observed, however, that under the old practice there was a considerable difference between the effect of a first attachment and of an attachment with proclamations upon the subsequent proceedings of the defendant. Under the old practice a defendant, after the first attachment returned, might, if he was resident above twenty miles from town, have obtained the ordinary *dedimus potestatem* or commission to put in his answer, or he might, as in ordinary cases, have pleaded or demurred, provided he did so within the usual time, without special leave; (*e*) but by an order of Lord Clarendon, it was ordered that after a contempt duly prosecuted to an attachment with proclamation, *returned*, no commision to answer should be made out, nor any plea or demurrer admitted, (*f*) but upon motion in Court and affidavit made of the party's inability to travel, or other good matter to satisfy the Court touching that delay; and the reason assigned *by Lord Chief Baron Gilbert for this distinction is, "because upon the first contempt on the first attachment it did not [*609] appear to be an affected delay, and therefore upon tendering the costs of the attachment the defendant might take his commission, and upon like tender the plea or demurrer are to be received; but if there regularly issued an attachment with proclamations, the defendant could not of course purge his contempt by a mere tender, but he must apply to the Court to shew that his plea or demurrer are proper, and to exhibit a proper excuse for his delay, in order that the Court might see that there was no further likelihood of delay by the plea or demurrer put in or by the commission to answer granted." (*g*)

No alteration in practice in this respect appears to have taken place in cases of commission sued out or plea put in after attachment with proclamations returned, (*h*) at least where the attachment has been issued upon a contempt for

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(*a*) Ibid. 114.
(*b*) Ibid. 115.
(*c*) Gilb. For. Rom. 76.
(*d*) Imp. Off. Sher. 338.
(*e*) Beames, Ord. 178.
(*f*) Lloyd v. Gunter, 1 Vern. 275; Newton v. Dent, 1 Dick. 234; Sanders. v Murney, 1 S. & S. 225.
(*g*) Gilb. For. Rom. 71.
(*h*) By order 10, 21 Dec. 1833, no demurrer can be put in after the expiration of twelve days from the appearance of the defendant.

want of answer, which, by the present practice, cannot issue till after the expiration of eight weeks in a town cause, and ten weeks in a country cause. Whether the late changes in the practice of the Court have affected this rule in the case of attachment with proclamations issued for want of *appearance*, has never been determined; but it is submitted, that as the 12th of Lord Brougham's orders, (*i*) by directing that, where a defendant is in contempt to an attachment for want of appearance, the interval between the day fixed by the *subpœna* for appearance and that on which the same is actually entered shall be deducted from the time allowed to plead, answer or demur, (not demurring alone) prevents a defendant in such case from gaining any advantage in point of time by standing out the processes of contempt, the defendant ought not to be prevented from suing out a *dedimus* to take his plea, answer or demurrer (not demurring alone) under the ninth of the above orders.

It is to be observed that the order of Lord Clarendon, above referred to, [*610] applies only to cases where the attachment with *proclamations *has been returned;* and that, therefore, when a defendant after such a writ had been issued, but before it was returned, put in a plea and answer, the Vice Chancellor, Sir J. Leach, refused a motion to take the plea and answer off the file under the above order, though he held that if it had been filed after the return of attachment with proclamations, it would have been irregular. (*k*)

The costs of an attachment with proclamations are 12*s.* 11*d.*, and if executed 15*s.* 3*d.* (*l*)

SECTION VI.

Of the Commission of Rebellion.

If a defendant, after proclamation made, (whereby he is cited to appear, &c., upon his allegiance,) still continues to disobey, he is considered as a rebel and a contemner of the laws; and the next process which issues against him is a commission of rebellion, which is a writ issuing out of and under the seal of the Court, directed to special commissioners therein named, commanding them, jointly and severally, to attach, or cause to be attached, the defendant, wherever he shall be found within the kingdom, as a rebel and contemner of the laws, &c. (*m*)

This writ, it is to be observed, is not usually directed to the sheriff, but to commissioners named in the writ; and the reason why it is so directed is stated to be, because the sheriff cannot be supposed to execute such process in person, and it may be inconvenient to lodge the discretionary powers thereby conferred in the deputies of a ministerial officer; "wherefore the Court appoints its own commissioners, who are enjoined to do every thing very carefully, and are answerable for their misbehaviour." (*n*)

(*i*) Ord. 1833, ord. 12.

(*k*) Sanders v. Murney, 1 S. & S. 225.

(*l*) 1 Smith, Ch. P. 131.

(*m*) Hind. 117. If the defendant is in contempt for want of *an answer*, this process, as well as the preceding one of attachment with proclamation, may be omitted, provided the terms of the 1 W. 4, c. 36, s. 15, rule 1, can be complied with. *Vide ante*, p. 605.

(*n*) Hind. 116. It is said in a note to James v. Philips, 2 P. Wms. 657, that by the course of the Court a commission of rebellion issues only to the *sheriff of Middlesex*. There does not, however, seem to be any authority in the books for this proposition, and the practice is otherwise. In the Practical Register, however, it is stated that the commission is sometimes directed to the sheriff, p. 129.

*This process, like the processes of contempt before enumerated, issues without order, unless where it is against a defendant resident [*611] in the Isle of Man, or in some part of the United Kingdom which is out of the jurisdiction of the Court, in which case there must be a previous order, under the statute 2 W. 4, c. 33; and 4 & 5 W. 4, c. 82, before referred to. (o)

The commission is made out by the plaintiff's clerk in Court, upon production to him of the attachment with proclamations, with the return of *non est inventus*. It is usually directed to four commissioners, selected by the plaintiff's solicitor, and is in the following form:

"William the Fourth, &c. To A. B., C. D., E. F., and G. H., gentlemen, greeting.

"Whereas, by public proclamations made on our behalf by the sheriff of Middlesex, in divers parts of that county, by virtue of our writ to him directed, Robert Edwards hath been commanded, upon his allegiance, personally to appear before us in our Court of Chancery, at a certain day now past; yet he hath manifestly contemned our said command: Therefore, we command you, jointly and severally, to attach, or cause the said Robert Edwards to be attached wheresoever he shall be found within our Kingdom of Great Britain, as a rebel and contemner of our laws, so as you have him, or cause him to be before us in our said Court, on (insert return day) wheresoever it shall then be, to answer to us as well touching the said contempt, as also such matters as shall be then and there objected against him, and further to perform and abide such order as our said Court shall make in this behalf. And hereof fail not. We also hereby strictly command all and singular mayors, sheriffs, bailiffs, constables, and other our officers and loyal subjects, and *servants whomsoever, as well within liberties as without, that they, by all proper means, dili- [*612] gently aid and assist you, and every one of you, in all things, in the execution of the premises. In testimony whereof we have caused these our letters to be made patent. Witness ourself at Westminster, this day of , in the year of our reign."

The names of the Master of the Rolls and of the Six Clerk are subscribed to this writ, and then it is to be folded up in the same manner as an injunction, and indorsed "By the Court, a Commission of Rebellion," (for want of an appearance or of an answer, or non-performance of a decree, order, &c., as the case is) "at the suit of A. B., plaintiff." On the label must be written the clerk in Court's name.

The commission being thus made out, two docquets in the following form must be written upon paper:

"The King, and so forth. A commission of rebellion directed to, (insert commissioners' names) jointly and severally, to attach Robert Edwards, defendant, for want of (appearance, answer, &c., as the case is) at the suit of Charles Banbury, plaintiff, returnable . Witness the King at Westminster, the day of , in the year of his reign."

The Master of the Rolls and Six Clerk's names being subscribed as before, the docquet should be folded up like an order, and indorsed near the top, "*Commission of Rebellion, E. F. against G. H.*," and near the bottom the Master of the Rolls, Six Clerk and clerk in Court's names; the commission being given to the bag-bearer of the office to be sealed, together with the docquets, he leaves one of the docquets with the entering registrar to be marked with an *intratur*,

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(o) *Ante*, 177, 179. It is stated in Hind. 116, *notis*, that a commission of rebellion could not be executed in Scotland. The above Acts have, however, been held to extend to the issuing of process of contempt in that part of the United Kingdom, in the cases expressed in those Acts, Cameron v. Cameron, 2 M. & K. 289; Parker v. Lloyd, 5 Sim. 508; and *vide ante*, 278.

and procures the other docquet to be signed by the Lord Chancellor, and leaves it with the clerk of the Hanaper-office: the commission is brought back sealed, and left with the clerk in Court, and delivered to the solicitor or to the commissioners to be executed.

The return of a commission of rebellion, as well as of other process of contempt, is regulated by the 1 W. 4, c. 36, s. 15, rule 3. (p)

[*613] *The commissioners upon the receipt of this writ are bound to arrest the defendant wherever they can find him; and it seems that they may, for this purpose, break open his house, or the house of any other person in which he may happen to be, (q) because the object of the writ is to deprive him of protection by law, to which, as "*a rebel and contemner of the law*," he is no longer considered entitled; and, therefore, it implies an authority to enter into the house. (r)

It seems, however, to be considered that in such case it is advisable for the commissioners making the arrest to have a peace officer with them; (s) and for this purpose the commission commands all mayors, sheriffs, bailiffs and constables, and all other officers, loyal servants and subjects, to render their aid and assistance to the commissioners in the execution of their duty.

A defendant may be arrested upon a commission of rebellion on a Sunday; (t) but Lord Loughborough said that he should much disapprove such an execution of it, unless in cases of absolute necessity; and that if executed in church he would punish the commissioners, and that they would have been punishable at law. (u)

Where a party is taken under a commission of rebellion in term time or during the public seals, the commissioners, if he be taken in or near to London, ought to bring him immediately to the Court; (x) but if the arrest takes place either in vacation time or in the country, and good security is offered for his appearance, the commissioners not only may, but ought to, take it. (y)

The bond in such cases is usually entered into by the party himself, with two sufficient securities, in the penal sum of 200*l.*, with the following condition: (z)

"*The condition of this obligation is such, that if the above founder, A. B., do personally appear before our Sovereign Lord the King, in His Majesty's Court of Chancery, on* (*insert the day on which the process is returnable) *on a commission of rebellion issued out of the same Court against him at the suit of C. D., and shall answer as well for his said contempt as for all such things as shall be then and there objected against him, and do and perform what the said Court shall award or order in that behalf, then the present obligation to be void, or else to remain in full force and virtue.*"

[*614]

The bond is usually made to the Master of the Rolls, but if made to the Lord Chancellor, Lord Keeper, &c., or to any two of the Masters, it will be good. (a)

If the party upon being arrested in the country, does not offer good bail, it is the duty of the commissioners, as soon as they have made the arrest, to bring him up to the Court immediately, (b) and if they omit to do this, and keep the defendant in their own custody, the Court will punish them for their omission;

(p) *Ante*, p. 578.
(q) Prac. Reg. 129; 2 Prax. 1 Alm. 75.
(r) Newl. Pra. 14; Gilb. For. Rom. 76; *vide* Lowten v. the Mayor of Colchester, 2 Mer. 395.
(s) Hind. 116.
(t) Hind. 116; Prac. Reg. 30.
(u) Ibid. 131.
(x) Prac. Reg. 129.
(y) Jones v. Clement, Bunb. 50.
(z) Hind. 119.
(a) Hind. 119.
(b) Studd v. Acton, 1 H. Bl. 468, 475.

thus where a commissioner had arrested a defendant upon a commission of rebellion, at the plaintiff's suit, for the breach of a decree, and imprisoned him for six weeks in his own house and other places, and refused to take bail for his appearance to answer the contempt, whereupon the defendant had, by order of the Court, entered his appearance upon the arrest by his clerk in Court, it was referred to the Six Clerks to certify whether upon a commission of rebellion for breach of a decree bail ought to be taken or not. The Six Clerks certified that the commissioners might either take or refuse bail, at their discretion; (c) but that in case they refused, then they ought to bring the party to the Court without delay; and thereupon the Court, on reading a precedent of the like nature made in Lord Ellesmere's time, ordered the commissioner to stand committed to the Fleet for his abuse, and to pay the defendant his costs and charges sustained by his imprisonment, to be taxed by the Master. (d)

*It may happen that at the time of the defendant's arrest the Court may not be sitting, in which case it will not be in the commissioners' power to bring him to the Court, the commissioners, however, must not, even under such circumstances, allow him to go at large without bail, but they should lodge him either in the Fleet prison, (e) or in the custody of the sheriff for safe keeping; (f) and where a commission of rebellion was awarded against the defendant for non-payment of costs, and the commissioner arrested him, and for his more safe keeping delivered him to the sheriff, who took charge of the prisoner accordingly, but refused either to deliver the prisoner to the commissioner or to bring him himself into Court at the day, a day was therefore given to the sheriff to bring in the body, upon pain of 10*l.* (g) [*615]

The proper course to be pursued in such a case, in order to bring in the body would, according to the present practice, be to procure a writ of *habeas corpus.* (h)

If the commissioners permit the party to escape after they have arrested him, they will be committed till they produce him; (i) if he be rescued, the rescuer will be committed. (k)

The return to this process is made by two or more of the commissioners who act under it. The return, when the commissioners are unable to find the party, should be endorsed upon the writ in the following form:

"*We, whose names are hereunto subscribed, being two of the commissioners within named, do humbly certify to this honourable Court that we have made diligent search and inquiry after the within named C. V.; but, notwithstanding all our endeavours for the purpose, we cannot meet with him, so as to attach his body by virtue of this commission. Witness our hand, this day of* . (l)

A. B. } Commissioners.
C. D. }

If the commissioners refuse or neglect to make a return to the commission, the Court, on motion or petition, will order them to return it; and, upon disobedience to the order, the *Court will, upon motion, grounded upon affidavit of service of the order, commit them; for not being parties to the suit, no writ of execution of the order is required to bring them into contempt. (m) [*616]

(c) This does not apply to decrees for payment of money into Court, or directing any other particular act to be performed, in which case it seems that commissioners of rebellion are not authorized to take bail, but they must have the body in Court at the return of the commission. 1 Harr. 129; and Jones v. Clement, Bunb. 50. *Vide post,* "Decrees,"

(d) Inglet v. Vaughan, 1 Ch. Rep. 265.
(e) 1 Harr. 129.
(f) Cary. 115.
(g) Ibid.
(h) *Ante,* 591.
(i) Sacheverell v. Sacheverell, Toth. 38.
(k) Hind. 118.
(l) 1 Smith, 118.
(m) Hind. 119, 120.

When the party is brought to the bar by this commission counsel should be instructed to move that he may be turned over to the Fleet prison, which will be ordered, of course; and after the defendant has been so turned over, he must remain there till he has cleared his contempt, or is otherwise discharged by order of the Court, or by the provisions of the 1 W. 4. c. 36, hereinafter referred to. (*n*)

Upon a return of *non est inventus* by the commissioners, or any two of them, the Court will, on motion, order the party to stand committed, and for that purpose the Lord Chancellor grants his warrant to the sergeant-at-arms to take him into custody. (*o*)

The costs of a commission of rebellion are 2*l.* 1*s.* 4*d.* (*p*)

SECTION VII.

Of the Segeant-at-Arms.

In the last Section we have seen that where the commissioners in a commission of rebellion return *non est inventus*, the next proceeding is for the Lord Chancellor to issue his warrant to the sergeant-at-arms, or his deputy, to take him into custody.

The sergeant-at-arms is an officer appointed by letters patent from the Crown, (*q*) who has an authorized deputy in constant attendance upon the Great Seal, whose duty, besides that of bearing the gilt mace before the Lord Chancellor, Lord Keeper or Lords Commissioners, in going or returning from Court or Parliament, is to execute all warrants against persons who [*617] *have stood out commissions of rebellion, either in execution of a decree or order of the Court, or on *mesne process*. (*r*)

It appears to be considered by some writers upon the practice of the Court, that besides the duties above mentioned, it belongs to this officer to bring up to the bar any one that is in the custody of a sheriff or other officer who has returned a *cepi corpus* upon a process of the Court; (*s*) and this appears to have been formerly the practice, though the more usual course now is to send a messenger for that purpose. (*t*)

The practice of sending a messenger appears to have been of recent origin, and has, in all probability, been adopted in consequence of it being less expensive than a sergeant-at-arms, whose fees are stated to be double those of the messenger. (*u*) A sergeant-at-arms may, however, go in all cases, in which a messenger can be sent. (*x*) And we have seen that where a messenger has been sent, and dies before he has executed his warrant (*y*) or fails in his execution of it, by reason of the defendant's escape, or not being to be found, the sergeant-at-arms ought to be sent in his stead. (*z*)

(*n*) *Post*, sect. 11.
(*o*) Prac. Reg. 130.
(*p*) 1 Smith, Ch. P. 131.
(*q*) Hind. 123.
(*r*) Hind. 123.
(*s*) Prac. Reg. 391; Hind. 123; 1 Harr. 135.
(*t*) *Ante*, 602; Frederick v. David, 1 Vern. 344.
(*u*) *Vide* Mr. Peacock's evidence, Chan. Rep. App. (A) 330.
(*x*) Frederick v. David, 1 Vern. 344, N. 1.
(*y*) M'Nab v. Mensal, 2 Sim. 16.
(*z*) *Ante*, 602; Sambroke v. Ekins, 1 Dick. 68; Wilkinson v. Belsher, 2 Bro. C. C. 181; Steed v. Calley, Law J. 1835, 1.

The reason for the sergeant-at-arms being sent in the last case is, because where the party has been taken, and has escaped, or cannot be found, the only remedy which a plaintiff can have is by sequestration against his property, which, as has been before stated, cannot be issued unless upon a return of *non est inventus* by the sergeant-at-arms.

The practice of sending the sergeant-at-arms, when the ordinary processes of contempt have failed, has been adopted by the Court *ex abundanti cautela*, lest there may have been any negligence in the ordinary officers or ministers of justice to whom the execution of the writs of attachment is entrusted, or lest the Commissioners of rebellion (persons nominated by the plaintiff) should collude with or be warped by their employer *to the prejudice of the defendant, to guard against which the Court, to satisfy its conscience, [*618] and to be informed whether the defendant doth actually hide himself from justice or not, sends an officer of its own, upon whose return only can a sequestration be regularly issued, unless the party be a peer or peeress of the realm, a bishop or member of the House of Commons, or an absconding defendant proceeded against under the statute 1 W. 4, c. 36. (*a*)

By an order, dated the 13th May, 1721, 7 Geo. 1, (*b*) after reciting that a petition had been presented by the sergeant-at-arms, setting forth that he is entitled to take all persons into custody who stand in contempt to a commission of rebellion returned *non est inventus*, and further reciting that several orders of commitment (for certain contempts in the said petition contained) had been executed by the Warden of the *Fleet*, or else that he had made returns *non est inventus*, whereupon sequestrations had been obtained contrary to the rules of the Court, and that the said petition had come on to be heard before his Lordship, and that upon hearing several precedents and what was alleged on either side, his Lordship had declared that no sequestration could regularly issue to sequester the estate of any person who could be found, but upon the return *non est inventus* of the sergeant-at-arms; IT IS THEREFORE ORDERED that from thenceforth where any person is in contempt, either for want of an appearance or answer, or for not yielding obedience to any order or decree of this Court, (unless it be for contemptuous language, or the beating or abusing any person in the serving of the process of this Court, or other contempts of the like nature) the sergeant-at-arms attending this Court do apprehend and bring the contemner to the bar of this Court to answer such contempt; but if the contemner cannot be found, then to return *non est inventus*, to the end that a sequestration may regularly issue, according to the ancient use and practice of this Court, and that process do for the future issue accordingly. (*c*)

This order was pronounced in consequence of a complaint *made [*619] by the sergeant-at-arms of a practice, then recently introduced, of making an order for the committal of the party to the custody of the Warden of the Fleet, and of awarding a sequestration upon his return of *non est inventus* instead of sending the sergeant-at-arms, according to the ancient practice, by which means the sergeant-at-arms was deprived of his ancient and customary fee. (*d*) The practice complained of appears to have been adopted for the purpose of shortening the process of the Court, which, however, it does not seem to have accomplished. The recent statute, however, of the 1 W. 4, c. 36, rule 1, has, as we have seen, effected this object more completely, in the cases to which it applies, by omitting the intermediate processes of attachment with proclamations and commission of rebellion, and enabling the plaintiff, in cases where the defendant is in contempt for want of an answer, to procure an order for

(*a*) Hind. 123.
(*b*) Hind. 126.
(*c*) Beames, Ord. 322, Prec. Cha. 552.
(*d*) Exp. Jephson, Prec. in Ch. 550.

a sergeant-at-arms immediately upon the sheriff's return of *non est inventus* to the the original attachment. The attention of the reader has been before called to the fact that this shortening of process does not apply to cases in which the defendant is in contempt for want of *appearance*, or in which the plaintiff's solicitor or his town agent is not prepared to satisfy the Court, by affidavit, that due diligence was used to ascertain the place where the defendant was at the time of issuing the attachment, and in endeavouring to apprehend him under the same, and that the person suing forth such writ truly believed that the defendant was in the county into which such writ had been issued. (*e*) In other cases the defendant must pursue the ancient course.

The above mentioned order of the 13th May, 1721, contains a reference to another method of shortening the process of the Court, which appears at that time to have prevailed, where a defendant had appeared and applied for time to put in answer. In that case it seems to have been the course of the Court to require the defendant, as a condition upon which further time was granted to him, to enter his appearance with the Registrar, (*f*) and upon his not putting in his answer within four days *after the time limited had expired, [*620] to move that he might stand committed to the custody of the Warden of the Fleet. This practice appears to have been considered by Lord Macclesfield as irregular, as far as it went to obviate the necessity for a sergeant-at-arms, (*g*) and in consequence it was made part of the order of the 13th May, 1721, "That it should be made a part of all orders for giving time to answer, or for doing any other act upon the party's entering his appearance with the Registrar, that the party when he enters such his appearance should likewise consent that a sergeant-at-arms should go against him, as upon a commission of rebellion returned *non est inventus*, in case of non-compliance." (*h*)

The practice enjoined by the last order does not appear to have been strictly followed, at least so far as relates to making it a condition of *every* order for time to answer that the defendant should consent to a sergeant-at-arms, for we find that by a subsequent order, dated the 23d January, 1794, after noticing the frequent and great delays of defendants in putting in their answers, it is ordered, that on a third application for time to answer, the defendant do consent to enter his appearance with the Registrar by his clerk in Court in four days, consenting that the sergeant-at-arms attending this Court shall go against him as on a commission of rebellion returned *non est inventus* in case he does not put in his answer by the time granted, and that on a second application for time to answer an amended bill, or after exceptions allowed, the defendant do consent to the same terms. (*i*)

The practice continued to be in conformity with the above order until the new orders of the 21st December, 1833, which have restored the practice to what it was under the order of the 17th May, 1721, by providing that in *every order granted by a Master for further time to answer*, it shall be made a condition of such order that the defendant shall enter his appearance with the Registrar, and consent to a sergeant-at-arms, as in the case of a commission of rebellion returned *non est *inventus*, unless under any special circumstances [*621] the said Master shall otherwise direct, and which circumstances shall be shortly stated in the order. (*k*)

An order for the sergeant-at-arms, on the return *non est inventus* upon a commission of rebellion, must be applied for by motion in Court, (*l*) the reason

(*e*) *Ante*, 606.
(*f*) As to the effect of entering an appearance with the Registrar, *vide post*, chap. X.
(*g*) Exp. Jephson, Prec. in Ch. 538. (*h*) Beames, Ord. 322; Prec. in Ch. 552.
(*i*) Beames, Ord. 555; 4 Bro. C. C. 544. (*k*) Ord. 21 Dec. 1833, Ord. XXI.
(*l*) Hind. 126.

of which is stated to be because, as there is nothing to issue under the Great Seal, to make it a record of the Court, there must be some act of the Court to authorize the *sergeant-at-arms* in going. (*m*)

Several abuses having crept into this practice, an order was made by the Lord Keeper *Finch*, (*n*) whereby after reciting that upon complaint made by the sergeant-at-arms attending the Great Seal, that after contempts were prosecuted to a sergeant-at-arms, and a commitment pronounced, the prosecutor would draw up the order, and never take forth a warrant thereon, but make use thereof to force the party prosecuted into some composition, sometimes for the whole matter in difference, but usually for the discharge of the contempts, whereby the sergeant's employment was rendered in great part ineffectual; for prevention thereof, his Lordship did order, that after any order for a sergeant-at-arms should be granted by the Court, the Registrar should, on request, draw up the said order, and deliver the same to the sergeant-at-arms or his deputy, and no other person, they paying for the same; by which means he should or might endeavour to apprehend the party prosecuted and bring him into this Court to answer his said contempt, if he could; but if he could not, his Lordship did further order, that no order for a sergeant-at-arms drawn up and past the Registrar, should be discharged, and the contempt thereupon, without the sergeant's fees be paid to him, and a certificate under his hand certifying the same; and that after the said order being so drawn up and passed as aforesaid, [*622] *no private or other agreement should be made between the party or parties, or the person or persons so standing in contempt as aforesaid, or any other person there, or any on their behalfs, without such satisfaction should be made and a certificate of the same produced to the Court. (*o*) This order was revived by the Lord Keeper, by order, dated 13th July, 1685, 1 J. 2, (*p*) and was again revived, by order, 12th June, 1694, 6 W. 3, whereby it was also further ordered, that when any motion should be made for a sergeant-at-arms, the counsel moving for the same should immediately, in Court, deliver unto the Registrar the commission of rebellion, and tell who was clerk in Court, that the sergeant-at-arms might have an account of him where the contemner lives; and that the order should be drawn up by the Registrar and delivered to the sergeant-at-arms or his deputy, they paying for the same, or taking out a warrant thereon, whereby the party or parties so in contempt might be taken into custody, and be brought into the Court to answer the same. (*q*)

In consequence of the above order, the practice now is, that whenever a sergeant-at-arms is moved for on a return *non est inventus* to a commission of rebellion, the commission, with the return, is placed in the hands of the counsel who makes the motion, who delivers it to the Registrar in Court, together with the name of the clerk in Court. (*r*)

The form of obtaining an order for a sergeant-at-arms under the 1 W. 4, c. 36, upon the sheriff's return of *non est inventus* to an attachment for want of an answer, is prescribed by rule 1 of sect. 15 of the Act, which is as follows, viz: "When a writ of attachment shall have been duly issued against any defendant for contempt in *not answering the bill*, and such defendant shall not have been taken under such writ, and the sheriff of the county into which such writ shall have issued shall make a return of *non est inventus* to the same, the Court shall, upon motion by or on behalf of the plaintiff, (notice of which shall not be required) order that the sergeant-at-arms *attending the Court [*623] do apprehend such defendant, and bring him to the bar of the Court to answer his contempt, and the same proceedings may thereupon be had as if

(*m*) Ibid.
(*n*) Ibid. 124.
(*o*) Beames, Ord. 245.
(*p*) Ibid. 168.
(*q*) Ibid. 302.
(*r*) Hind. 126, 1 Turn. & V. 120.

such order had been made in the manner heretofore in use; provided that before such order shall in any such case be made, the plaintiff applying for the same shall be required to satisfy the Court, *by the affidavit of the solicitor of the plaintiff, or of his town agent, if the writ of attachment was issued by such town agent, that due diligence was used* to ascertain the place where such defendant was at the time of issuing such writ, and in endeavouring to apprehend such defendant under the same, and that the person suing forth such writ verily believed at the time of suing forth the same that such defendant was in the county into which such writ was issued."

Upon a motion made for a *sergeant-at-arms* under this rule, the Vice Chancellor, Sir L. Shadwell, decided that the affidavit thereby required must be made by the clerk who issued the attachment, and that the town agent must join in the affidavit, swearing as to his belief; (*s*) and in *Pugh* v. *Pugh*, (*t*) an application was made to the Master of the Rolls (Sir C. C. Pepys) for a sergeant-at-arms under this rule, which was supported by an affidavit of the solicitor's town agent, stating that he had issued the writ and that he verily believed that the defendant was in the county of Middlesex at the time of its issue, and also by an affidavit of the sheriff's assistant, stating the steps he had taken to attach the defendant, but in which he had been unsuccessful; but his Honor refused the application, because there was no affidavit of the solicitor or his town agent that due diligence had been used in endeavouring to apprehend the defendant, as required by the Act; his Honor being of opinion that as the Act had expressly pointed out the persons with whose evidence the Court was to be satisfied, no other evidence could be satisfactory.

In *Wright* v. *Green*, (*u*) however, it was held that an affidavit by the solicitor's agent who had sued out the writ, *setting out *verbatim* the [*624] copy of a letter which the plaintiff had received from the officer employed in executing the writ, and in which the particulars of two unsuccessful attempts to arrest the defendant was detailed, and swearing, to the agent's belief, that the contents of the letter were true, was sufficient.

It is to be observed that in that case the affidavit did not state in terms that the agent believed that due diligence had been used in endeavouring to apprehend the defendant, but that Lord Brougham was of opinion that the letter of the officer to the plaintiff had disclosed circumstances sufficient in reason to satisfy the Court that such diligence had been really used, and that as the agent had sworn to his belief that the contents of the letter were true, there was altogether sufficient in the affidavit to satisfy the Court that the terms of the Act had been complied with.

It has, however, also been held that in general the affidavit ought to follow precisely the terms of the Act, and therefore where it only went to show that due diligence had been used to discover the defendant's residence, and not the place where *he actually was at the time of issuing the attachment*, the order was refused; (*x*) and so where a motion of this nature was supported by the affidavit of the plaintiff's town agent, stating that all due diligence had been used to ascertain the place of the defendant's residence at the time when the writ was issued, and to apprehend him by virtue thereof, and that at that time the defendant's last and only known place of abode was in the county into which the writ had been issued, Lord Brougham was of opinion that the affidavit was clearly defective in not swearing to the party's belief that the defendant was in the county at the time of the issuing of the writ; an omission which was by no

(*s*) Handfield v. Wolley, 4 Sim. 122. (*t*) 2 M. & K. 358.
(*u*) 2 Russ. & M. 93.
(*x*) Davis v. Hammond, 5 Sim. 9; Meller v. Mellish, cited ib; Miller v. Bennett; Carr v. Powlett, Sugden's Acts, by Jemmett, 61, n. (*c*).

means supplied by the statement that at the time the defendant's last and only known place of abode was in the county into which the writ had issued. (y)

*Where a party upon obtaining an order for time to answer, is to enter his appearance with the Registrar and submit that upon his [*625] default a sergeant-at-arms should go as upon a return of *non est inventus* to a commission of rebellion, in such case the order for the sergeant-at-arms is granted upon a certificate of the Six Clerk that the answer is not filed; (z) and it seems that such an order may be obtained upon petition as well as upon motion. (a)

The order for the sergeant-at-arms having been drawn up, passed and entered, (b) the clerk in Court or solicitor must give it to that officer or his deputy attending the Court, who procures the Lord Chancellor's warrant thereon, and at the return thereof certifies in what manner he has acted under it. (c)

The duty of the sergeant-at-arms or his deputy, upon receiving the warrant, is to arrest the defendant wherever he can find him, and it appears that he is armed with very extensive powers for that purpose. (d) It is to be observed, that the caption of a party, under a warrant of the Lord Chancellor, but executed after he has delivered up the Great Seal, will not be irregular. (e)

The sergeant-at-arms can take no bail bond, therefore if a party be taken by a sergeant-at-arms, in execution, he must be kept in custody till the return and then brought up to the *bar of the Court, but if he be taken for [*626] want of appearance or answer, he may, upon his entering his appearance or filing his answer, and paying the costs of his contempt, be discharged; and if the plaintiff's solicitor refuse to discharge him, the Court will, upon motion or petition, order his discharge. (e)

It is to be observed, that where the sergeant-at-arms has been sent, for a contempt in not putting in an answer, the defendant is entitled to his discharge *immediately* upon putting in his answer and clearing his contempt, and is not to be kept in custody till the sufficiency of the answer has been decided upon; and if in such case the sergeant-at-arms refuse to discharge him, the defendant must apply by motion or petition, upon a certificate from the clerk in Court that the answer has been filed and the costs of the contempt have been tendered or paid, (as the case may be) and the Court will make an order for his discharge, which must be served upon the sergeant or his deputy having the defendant

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(y) Handfield v. Wildes, 2 R. & M. 91. (z) Hind. 127.

(a) Countess of Londonderry v. Cornthwaite, 1 Dick. 285.

(b) The sergeant-at-arms or his deputy generally takes upon himself to draw up the order and to get the warrant from the Lord Chancellor, after which he applies to the clerk in Court or solicitor for instructions, 1 Turn. & V. 120.

(c) Hind. 126.

(d) It appears from an extract taken from a manuscript of the Antiquities of the office, in the 5th year of the reign of King Henry V, that "a sergeant-at-arms may apprehend or attach any subject of the King's or other, whatsoever he be, remaining in the four seas of England, or any part thereof, be it any house, castle or fort, that will be broken to make his arrest, may rase and beat down to the ground; and the power of the sergeant-at-arms is, that if rescues be made unto him, he may levy the power of the country where the rescue is made; neither can any arrested by the sergeant-at-arms be by any other attached out of his guard upon a great ransom, for an arrest made by the sergeant of the King hath enfranchised his body from all other persons; *for the sergeant's arrest is of more high nature than any other can be*, and therefore the sergeant-at-arms is commonly called 'the valorous force of a King's errand in the execution of justice.'" *Vide* Mr. William Butt's Evidence, Chan. Rep. App. A, 328.

(e) Nash v. Youston, Law, J., 1835, 86. (e) Hind. 126.

in his custody; and a refusal to obey such an order would be a contempt of Court. (*f*)

If the defendant upon being taken does not clear his contempt, he must be brought to the bar of the Court; and by the 1 W. 4, c. 36, s. 15, rule 5, it is provided that where a defendant is in custody of the sergeant-at-arms or of the messenger, upon attachment or other process, the plaintiff shall, within ten days after his being taken into such custody, (or if the last of such ten days shall happen out of Term, then within the first four days of the next ensuing Term,) cause the defendant to be brought to the bar of the Court; and in case any defendant shall not be brought to the bar of the Court within the respective times aforesaid, the sheriff, jailer or keeper, sergeant-at-arms or messenger, in whose custody he shall be, shall thereupon discharge him out of custody, without payment by him of the costs of the contempt, which shall be payable by the party on whose behalf the process issued.

When the party is brought up to the bar by the sergeant-at-arms, he will be dealt with in the same manner as a party brought up in the custody of the messenger. (*g*)

[*627] *If the sergeant-at-arms cannot succeed in arresting the defendant, he must write a return or certificate of *non est inventus* upon the back of the warrant, which must be filed in the Report Office before a writ of sequestration, which is the next process, can regularly issue. (*h*)

It is to be observed, that the costs of a sergeant-at-arms are not settled, as upon other processes, but are to be taxed by the clerks in Court for the plaintiff and defendant, and are according to the distance the sergeant has to go in seeking for the party. (*i*)

SECTION VIII.

Of the Writ of Sequestration.

When the *sergeant-at-arms* has been ordered to take a defendant into custody for a contempt upon *mesne process*, and returns *non est inventus* or "a rescue," or "that he has been resisted in the execution of his duty," the next process which issues to compel the obedience of the party is a *sequestration*.

The process of sequestration is a writ or commission issuing under the Great Seal, sometimes directed to the sheriff or (which is most usual) to certain persons of the plaintiff's own nomination, empowering him or them to enter upon and sequester the real and personal estate and effects of the defendant, (or some particular part or parcel of his lands) and to take, receive and sequester the rents, issues and profits thereof, and keep the same in their hands, or pay the same in such manner and to such persons as the Court shall in its discretion

[*628] appoint, until the parties shall have appeared to or answered *the plaintiff's bill, (or performed some other matter which has been ordered and enjoined by the Court, in the process specifically mentioned,) and for not doing whereof he is in contempt. (*k*)

(*f*) Waters v. Taylor, 16 Ves. 418. *Vide post*, "Answers."
(*g*) *Vide ante*. 604.
(*h*) Hind. 126.
(*i*) Ibid. 127.
(*k*) Hind. 127.

Sequestrations are stated to have been first introduced in Sir Nicholas Bacon's time, and then were but sparingly used in process, and after a decree to sequester the thing in demand only. (*l*) It is said that the first instance of a sequestration after a decree was in *Sir Thomas Reed's* case, in Lord Coventry's time. Another was issued in *Lake* v. *Meares*, (*m*) 11 Jac., and in the case of *Hide* v. *Petit*, in 1666, (*n*) which was affirmed in part. The same process appears to have been adopted by the Court of Exchequer in *Greavus* v. *Fontaine*, 1687, and in a case of *Whitham* v. *Bland*, (*o*) in Lord Shaftesbury's time.

There appear, however, to have been great struggles between the Courts of Common Law and Courts of Equity before this process was established, the former holding that a Court of Conscience could only give *remedy in personam* and not *in rem*, and that sequestrators were trespassers, against whom an action at law would lie; (*p*) and to such extent does the objection of the Courts of Law to this process appear to have been carried, that according to a case cited by the Lord Chancellor, (Nottingham) in *Colston* v. *Gardiner*, (*q*) a question was entertained upon an indictment for murder, where one was killed on laying on a sequestration, whether the homicide was justifiable or not. "Whereupon a pardon was sued out." (*r*)

"But these were such bloody and desperate resolutions, and so much against common justice and honesty, which required that the decrees of this Court which preserved men from fraud and deceit should not be rendered illusory, that they could not long stand," (*s*) and the process is become, by long *use and acquiescence, and is now looked upon, as the legal and ordinary process of the Court. (*t*) [*629]

A sequestration upon *mesne process* is usually directed to four sequestrators, and care ought to be taken that the persons named be such as are able to answer for what shall come to their hands, in case they should be called upon to account. (*u*)

The writ or commission is in the following form:

William the Fourth, &c. To &c. Greeting. "Whereas A. B. complainant, exhibited his bill of complaint in our Court of Chancery against C. D. defendant.

"And whereas the said C. D. being duly served with a writ issuing out of our said Court, commanding him, under the penalty therein mentioned, to appear to and answer the said bill, hath refused so to do; and thereupon all process of contempt hath issued against him unto a sergeant-at-arms.

"And whereas the said C. D. hath of late absconded, and so concealed himself that the said sergeant-at-arms hath not been able to find him, as by the certificate of the said sergeant-at-arms appears: Know ye therefore, that we, in confidence of your prudence and fidelity have given, and by these presents do give to you, any three or two of you, full power and authority to enter

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(*l*) Earl of Kildare v. Sir M. Eustace, 1 Vern. 421.
(*m*) Toth. 176.
(*n*) 1 Ch. Ca. 93; Freeman, 125, 168, S. C.; and Bedinfield v. Zouch, ib.
(*o*) 2 Cha. Ca. 43; Hind. 128.
(*p*) Blagrave v. Watts, 1 More, 549; Cro. Eliz. 651.
(*q*) 2 Ch. Ca. 44. (*r*) Gilb. For. Rom. 78.
(*s*) Ibid. 2 Cha. Ca. 45.
(*t*) Hind. 128. Where *nulla bona* has been returned to a sequestration in this country, another sequestration may be issued against the defendant's property in *Ireland*. Fryer v. Bernard, 2 P. Wms. 261; but for a sequestration to the colonies, application must be made to the King in Council. Ibid.
(*u*) 1 Har. 143.

upon all the messuages, lands, tenements, and real estate whatsoever of the said C. D., and to take, collect, receive and sequester into your hands, not only all the rents and profits of the messuages, lands, tenements and real estate, but also all his goods, chattels and personal estate whatsoever. And therefore we command you, any three or two of you, that you do, at certain proper and convenient days and hours, go to and enter upon all the messuages, lands, tenements and real estate of the said C. D., and that you do collect, take and get into your hands, not only the rents and profits of all his said real estate, but also all his goods, chattels and personal estates, and detain and keep the same under [*630] sequestration in your hands until the said C. D. shall *fully answer the complainant's bill, clear his contempt, and our said Court make other order to the contrary. Witness ourself at Westminster," &c.

It has been before stated that a sequestration is the next proceeding upon *mesne process*, which is issued after the return of *non est inventus* by the sergeant-at-arms, and that the sergeant-at-arms is the only officer upon whose return such process can be issued. (*x*)

A sequestration may, however, be issued where a defendant resists the sergeant-at-arms, or makes a rescue. (*y*)

In cases of contempts in the non-performance of a decree or order of the Court, sequestrations may be issued although the sergeant-at-arms has not been sent, as where a defendant is already in custody under an attachment or other process of contempt, and obstinately persists in his contempt. It may also be issued to enforce a decree or order where the defendant is in custody in another suit, either at law or in equity, or upon criminal process. It is not, however, the practice to issue sequestrations where the defendant is in custody for a contempt upon *mesne process*, because where a defendant is in custody upon *mesne process* the practice of the Court enables the plaintiff to obtain the effect of that process, either by entering an appearance for him under the statute 1 W. 4, c. 36, s. 11, or by taking the bill *pro confesso* against him under the fifteenth section of the same act.

This writ is always obtained upon motion. If it be moved for upon a return of *non est inventus* by the sergeant-at-arms, the counsel who moves must have the warrant with the return in his hand. (*z*) If the party in comtempt has resisted the sergeant, or having been taken has made his escape and stands out in contempt, in such cases the motion must be supported by an affidavit of the facts. (*a*)

No sequestration can be granted upon petition. (*b*)

The order for a sequestration being drawn up, passed and entered, is to be left with the plaintiff's clerk in Court, together with the names of the persons whom [*631] the plaintiff chooses *to have inserted as commissioners, and the clerk in Court will thereupon make out the writ in the form before mentioned. (*d*)

The writ is folded up like an injunction, and the Master of the Rolls and Six Clerk's names subscribed, It must be indorsed, "*A commission of sequestration against C. D. defendant, at the suit of A. B. complainant*," with the Master of the Rolls and Six Clerk's names. (*e*)

The clerk in Court having made out the sequestration, delivers it to the bag-bearer of the Six Clerks' office to be sealed, which being done, the bag-bearer leaves it at the clerk's seat in the office, to be given to the solicitor when he calls. (*f*)

(*x*) *Ante*,
(*z*) Hind. 136.
(*b*) Beames, Ord. 35, 215.
(*e*) Ibid. 138.
(*y*) Beames, Ord. 16.
(*a*) Ibid.
(*d*) Hind. 136.
(*f*) Ibid.

An opinion appears formerly to have been entertained in the profession, that a sequestration upon *mesne process* for want of an answer ought not to be executed, and that the plaintiff, instead of having it carried into effect, ought merely upon its issuing to proceed to take the bill *pro confesso* against the defendant. This opinion seems to have arisen in consequence of what was said by Sir Thomas Sewell, M. R., in *Heather* v. *Waterman*, (*g*) and *Vaughan* v. *Williams*. (*h*)

In the former case, the defendant being in contempt to a sequestration in *mesne process* for want of an answer, the sequestrators executed the commission, and the plaintiff preferred a petition (which came on for hearing at the same time with the cause, in which the bill was ordered to be taken *pro confesso*,) praying that the sequestrators might account and pay the balance to him in part of his demand, whereupon the Master of the Rolls reprobated the execution of the sequestration, saying it was very improper and what should not have been done, and reprehended the solicitor very severely. In the latter case, the Master of the Rolls also expressed an opinion that when a bill had been taken *pro confesso* on a sequestration for want of an answer, the execution of the sequestration was unnecessary and improper. These cases appear to have been cited by Mr. Dickens, the Registrar, in the notes handed up by him to the Lord Commissioners of the Great Seal, in *Rowley* v. *Ridley*, (*k*) in support of the distinction taken by him between sequestrations in [*632] *mesne process* and for a duty, namely, that a sequestration in *mesne process* ought not to be executed; but with reference to those cases, it is to be observed that they go no further than to show that when the plaintiff intends to proceed to have the bill taken *pro confesso* against the defendant, the execution of the sequestration is unnecessary, and therefore improper, because the object of executing the sequestration being merely to compel an answer from the defendant, the same purpose is effected by taking the bill *pro confesso* against him, (by which process the plaintiff obtains the same decree that he would have been entitled to had the defendant put in his answer and admitted the whole case made by the bill,) and this being accomplished, the process drops as a matter of course, and the sequestrators become accountable, not to the plaintiff or to the Court, but to the defendant. In fact the practice appears to be, that a plaintiff, upon obtaining a sequestration against a defendant for want of an answer, has an option whether he will proceed to take the bill *pro confesso*, or to compel answer: if the circumstances of the case are such that justice can be obtained by taking the bill *pro confesso*, he ought not to cause the sequestration to be executed; but if his case is such that an answer from the defendant is necessary, he may. It should be observed, however, that the cases in which a plaintiff can have occasion to compel an answer from a defendant instead of taking the bill *pro confesso* against him are comparatively few, and are in general confined to bills of discovery, where the answer is wanted to be read at law, or to obtain some admission from him on which to found some application to the Court, and that unless in such cases the proper course to adopt is that of taking the bill *pro confesso*. (*l*)

*The executing of the sequestration, however, will not preclude [*633] the plaintiff from proceeding to take the bill *pro confesso*; and where

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(*g*) 1 Dick. 335. (*h*) Ibid. 354.

(*k*) 2 Dick. 622. It appears from the statement of this case by the Solicitor General in Simmonds v. Lord Kinnaird, 4 Ves. 735, 739, that this case is erroneously reported; and in the note of the same case in 3 Swanst. 306, n., (*b*) Lord Thurlow is reported to have said that he could see no foundation, either in the reason of the thing, or in the history of the Court, for supposing that a sequestration to compel an appearance or answer, should not be executed.

(*l*) *Vide post*, Chap IX.

a *nihil* has been returned by the sequestrators upon this writ, the Court, upon petition or motion, and production of the writ so returned, will direct the cause to be set down for hearing, and at the day of hearing will order it to be taken *pro confesso*. (*m*) And even where goods or real estate have been seized under a sequestration, the plaintiff is not precluded from proceeding to take the bill *pro confesso*; (*n*) and where a bill has been filed for an account, and a decree *ad computandum* obtained by taking the bill *pro confesso*, the Court will not only permit the execution of the sequestration, but will keep it on foot as a security for the defendant's accounting in the Master's office. (*o*)

Where a defendant has not appeared, and has stood out all the preceding processes, unless he come within the description of a defendant absconding to avoid the process of the Court, (the method of proceeding against whom for the purpose of taking a bill *pro confesso* against him has been before pointed out,) (*p*) or unless he be a person resident abroad, (for whom an appearance can be entered under the 2 & 3 W. 4, c. 33, and 4 & 5 W. 4, c. 82, before referred to,) (*q*) no other means than that of a sequestration can be resorted to for compelling his appearance; against such a person therefore, if an answer from him is necessary, the sequestration should be executed, as the only method of compelling his obedience, within the reach of the plaintiff.

It should be observed, however, that in cases where the interest of a defendant whose appearance cannot be enforced by means of the preceding processes of contempt is such that a decree can be made in the cause against the other [*634] defendants *without his presence, a sequestration need not be executed, and that the mere issuing of the sequestration is sufficient. It has been held, that a sequestration is like an outlawry; so that if a defendant, who cannot be found so as to be served with process, is proceeded against to a sequestration, and does not then appear, you may proceed against the rest. (*s*) But, in such cases, care must be taken that all the preceding processes have been regular, otherwise the Court will not permit the case to go on against the defendant who has appeared, unless the plaintiff will consent to stand in the place of the defendant who has not appeared, to all purposes; and therefore, where in a case of this nature it appeared, upon reading the affidavit of service of the *subpœna* upon the absent defendant, that the writ had been left at a place where he had but once lodged, and that two years before the service, it was held that the service was wrong, and that the plaintiff could not be permitted to go on against the other defendant. (*t*)

The above rule must be taken as applicable to cases where the defendant is resident abroad, out of the reach of the Court, in which case, if he cannot be made to appear, it amounts to the same thing as if the plaintiff had taken out process for want of appearance, and had carried it through the whole line of

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(*m*) Gibson v. Scevington, 1 Vern. 247. In the Court of Exchequer the practice appears to be, in cases where it is intended to take the bill *pro confesso*, to put the sequestration into the hands of the commissioners, and to procure them to return *nulla bona*, and upon that return to move that the bill may be taken *pro confesso*. *Vide* Desbrow v. Crommie, Bunb. 272, 1 Fowl., Exch. p. 153.

(*n*) Davis v. Davis, 2 Atk. 22.

(*o*) Maynard v. Pomfret, 3 Atk. 468; Shaw v. Wright, 3 Ves. 22. *Vide etiam* Heyn v. Heyn, Jac. 49. As to whether it will permit it to remain as a security for the ultimate balance, *vide post*, p. 636.

(*p*) *Ante*, 270. (*q*) *Ante*, 277.

(*s*) Lord Craven v. Widdows, 2 Ch. Ca. 139; Parker v. Blackbourne, Prec. in Ch. 99; 2 Vern. 369, S. C.; Phillips v. Duke of Buckingham, 1 Vern. 228; Downes v. Thomas, 7 Ves. 206.

(*t*) Parker v. Blackbourne, *ubi supra*.

process to a sequestration. (u) Upon this principle, when a bill was brought against one partner for a joint demand, and the other was out of the kingdom, Lord Hardwicke held that the partner before the Court ought to be compelled to pay the whole. (x)

It is to be observed, that in *Phillips* v. *The Duke of Buckingham*, (y) where one of the defendants was in contempt for want of an answer, and had stood out to a sequestration, and the cause had been heard against the other defendants, the *defendant who was in contempt was afterwards allowed to come in and answer, and the cause was then regularly proceeded [*635] in and heard against him.

When a sequestration upon *mesne process* is to be executed, it should be delivered by the solicitor to the sequestrators, with proper instructions for carrying it into effect. (z)

The sequestrators are officers of the Court, and as such are amenable to its authority, and are to act from time to time in the execution of their office as they shall be directed; they are to account for what comes to their hands, and are to bring the money into Court as they shall be directed, to be put out at interest, or otherwise, as shall be found necessary; but such money is not usually paid to the plaintiff, but is to remain in Court till the defendant hath appeared, or answered, or cleared his contempt, and then whatsoever hath been seized shall be accounted for, and paid over to him. (a) In this respect, Lord Hardwicke observed, there exists a great difference between a sequestration upon *mesne process* and a sequestration to compel the payment of money under an order or decree, for in the latter case, after the process has been executed, and goods and estate sequestered under it, the plaintiff may have them applied to satisfy his demand, which he cannot have upon process for contempt. (b) It is said, however, in the books, that even in the case of a sequestration upon *mesne process* the Court has the whole under its power, and may do therein as it pleases, and as shall be most agreeable to the justice and equity of the case; (c) and in *Maynard* v. *Pomfret*, (d) where a defendant, in contempt for want of answer, had stood out the whole process to a sequestration, whereupon the bill was taken *pro confesso* against him, and a decree made *ad computandum*, Lord Hardwicke himself refused to discharge the sequestration on the defendant's paying the costs of contempt only, but kept it on foot as a security for his appearing before the Master to account. It should be noticed, that in the above case, *the material part of it, as against the defendant, was the discovery to be elicited from him by his answer, and that the [*636] object of keeping the sequestration on foot, as stated by Lord Hardwicke, was merely to compel him to go before the Master to be examined as to the same points as those to which the discovery from him, by answer, was material. His Lordship did not go the length of saying, that he would keep the sequestration on foot to enforce the payment of the balance which might be eventually found due from the defendant upon the account; but in *Shaw* v. *Wright*, (e) Lord Loughborough appears to have considered the case of *Maynard* v. *Pomfret* as going the whole length of proving, that though the sequestration issued as *mesne process* to compel an answer, yet it should remain if there was any duty to be performed, and to have acted upon that view. In *Shaw* v. *Wright*, the bill

(u) Darwent v. Walton, 2 Atk. 510. *Vide ante*, 258, 366.

(x) For the course of proceedings against parties who are abroad, in cases where it is important to obtain an answer, or to take the bill *pro confesso* against them, *vide ante*, chap. iv. s. 12.

(y) 1 Vern. 228.

(a) Hind. 138.

(c) Hind. 139.

(e) 3 Ves. 22; *ante*, 633.

(z) 1 T. & V. 122.

(b) Davis v. Davis, 2 Atk. 24.

(d) 3 Atk. 468, *ante*, 633.

had been filed by residuary legatees against an executor for an account of his testator's personal estate, and a sequestration had been issued for want of an answer, and had been executed. The bill had also been taken *pro confesso*, and a decree *ad computandum* pronounced, and the Court not only kept the sequestration on foot till the defendant should have accounted, but upon a petition being presented by the plaintiffs, which came on for hearing at the same time with the cause for further directions, ordered the sequestrators to pay the amount in their hands into Court to the credit of the cause, "to the account of the personal estate of the testator." The Court, as it appears from the report of the case, felt no difficulty in keeping the sequestration on foot, so that the sequestrators might continue to receive the rents and profits, and pay them into Court. (*f*)

The sequestrators under a sequestration in *mesne process* may take possession of all the defendant's goods and chattels. (*g*) This, however, must be understood as applying to those goods *and chattels only which are in the [*637] possession of the defendant, or which can be come at without suit or action; for although some doubt appears formerly to have been entertained upon the point, it seems now to be the established rule of the Court that *choses in action* cannot be sequestered. (*g*) Thus in *Gibbons* v. *Buckworth*, (*h*) where a partner with one Thomas Bundy, as master of a ship, in a voyage to Guiana, sued his administrator to sequestration for want of an answer, and then sued a merchant, who had possessed nineteen bars of gold, the property of Bundy, and coined them, it was held, that the sequestration was no title, for a mere right of action cannot be sequestered. And so where upon a sequestration against a defendant, for want of a sufficient answer, an application was made that the grantor of an annuity to the defendant might pay into Court the arrears of the annuity, the Vice Chancellor, Sir L. Shadwell, held, that he could not, upon mere notice, had there been nothing else in the case, have made the order. (*i*) It appeared, however, that the plaintiff had on a former occasion obtained an order, (upon the grantor's appearing in Court by counsel, and consenting) that he might pay the arrears and future payments of the annuity into Court; and His Honor therefore held, that after giving his consent to such an order, it was not consistent for the grantor to say he ought not to pay in the arrears. (*j*)

The opinion of the Vice Chancellor in the above case appears to be in conformity with that of Lord Thurlow in *Fenton* v. *Lowther*, (*k*) who held that

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(*f*) Reg. Lib. 1795, B. 652. The words of the order are, "It is ordered that the sequestrators appointed by this Court of the personal estate of the defendant, Peter Wright, do pass their accounts before the said Master, and after payment of their costs, and such allowances as the said Master shall think proper, then from time to time to pay the balance which shall be found due from them into the Court, with the privity of the Accountant General, to be there placed to the credit of this cause, the aforesaid account of the residue of the testator's personal estate, subject to the further order of the Court, &c."

(*g*) 1 Barnard, 431.

(*g*) The only authorities in support of the opposite opinion appear to be Lake v. Meares, Toth. 175; and Opie v. Maxwell, cited 4 Ves. 744. With respect to the former of which cases it has been observed, that the note is very short, and that it occurred at an early period, when the duty of sequestrators was very little known. *Vide* Simmonds v. Lord Kinnaird, 4 Ves. 735, 744.

(*h*) Cited by Lord Nottingham in his *Prolegomena* of Equity, chap. 28. *Vide* 4 Ves. 744.

(*i*) Johnson v. Chippindall, 2 Sim. 55.

(*j*) Ibid. His Honor said, in reference to the case of Lord Pelham v. the Duchess of Newcastle, (reported in 3 Swan. 290, *notis*,) in which it appears that a sum of money belonging to the party in the hands of a partner had been sequestered, that probably the banker had consented to the order.

(*k*) 1 Cox. 315.

a salary to an equerry to one of the Royal Family could not be taken under a sequestration for want of an answer; and in *Dundass* v. *Dutens* (*l*) the same *learned Judge was of opinion that stock or property in the funds, &c., being *choses in action*, could not be reached by the process of [*638] this Court. It is to be observed, however, that a pension granted by the Crown is not a *chose in action*, and may be received by the sequestrators at the Treasury, although the defendant is not the original grantee, but merely an assignee claiming under him, (*m*) and that the Court will, upon application, make an order, restraining the defendant from receiving the pension, and directing the sequestrators to receive it, without serving any ordor upon the Lords of the Treasury for that purpose. (*n*)

But although a pension from the Crown may, as we have seen, be sequestrated, the half-pay of an officer in the army or navy cannot be either assigned or attached. (*o*) This distinction arises from principles of public policy, which considers half-pay as intended to provide decent maintenance for experienced officers, both as a reward for their past services, and to enable them to preserve such a situation that they may be always ready to return into actual service. (*p*)

The question whether the commissioners under a writ of sequestration upon *mesne process* can seize the books and papers, &c., of a corporation was discussed in *Lowten* v. *The Mayor of Colchester*, (*q*) but was not decided, although Lord Eldon expressed strong doubts as to the existence of such a power.

It appears from the last-mentioned case, that upon a comparison between a commission of rebellion and a sequestration, Lord Eldon was of opinion sequestrators have the power of breaking open doors in the execution of their duty; and in *Lord Pelham* v. *The Duchess of Newcastle*, (*r*) Lord Thurlow allowed the sequestrators to open boxes and rooms that were locked, if the keys were denied them, and to schedule the goods in them, but to remove nothing from the house without the special order of the Court.

*The latter part of the order in the above case, which prohibits [*639] the sequestrators from removing anything from the house, is consistent with the ordinary practice of the Court, which, considering goods taken upon sequestrations in *mesne process* as in the nature of a pledge to answer the contempt, merely gives the sequestrators power to take the property from the defendant, and to prevent his enjoyment of it till he has cleared his contempt. And it seems that if the sequestrators take upon themselves to remove the defendant's property, they will be liable to an attachment. (*s*) Sequestrators are, however, bound to keep the defendant really, and not nominally, out of possession of his property, (*t*) as "the Court must not be trifled with, and its process must be made effectual."

As the sequestrators upon *mesne process* have no power to remove goods, much less have they power to sell them. If a sale is wanted, application should be made to the Court for permission to sell; but an order for the sale of goods taken upon *mesne process* will scarcely ever be made, unless for the purpose of raising money to pay the expenses of the sequestration, or where the goods are of a perishable nature, such as rents paid in kind, or the natural produce of a farm. (*u*)

(*l*) 1 Ves. J. 196.
(*m*) M'Carthy v. Gould, 1 Ball. & B. 387.
(*n*) Ibid.
(*o*) Ibid. *Vide etiam* Stone v. Lidderdale, 2 Anst. 533; Collyer v. Fallon, 1 T. & R. 459.
(*p*) Ibid.
(*q*) 2 Mer. 395.
(*r*) 3 Swan. 290, n.
(*s*) Desbrow v. Crommie, Bunb. 272.
(*t*) Hales v. Shaftoe, 1 Ves. jun. 86.
(*u*) Shaw v. Wright, 3 Ves. 22; Wilcocks v. Wilcocks, Amb. 421.

In *Wharam* v. *Broughton*, (x) Lord Hardwicke is reported to have said, that "it is not of a great many years standing that the Court has ordered goods to be sold to satisfy payment after a decree, but it is very lately that the Court has ordered it for a collateral contempt in proceeding before a decree, which the Court now does in aid of its proceedings," from which it has been inferred that the Court does, in such cases, possess the power of ordering a sale. In *Hales* v. *Shaftoe*, (y) however, the Master of the Rolls, (Lord Alvanley,) doubted whether, upon *mesne process*, he could make such an order, and afterwards, in the same case, Lord Thurlow refused it; (z) and the practice of the Court seems now to be adverse to directing such a sale, except in the cases above [*640] specified. (a) In confirmation *of which it is to be observed, that in *Wilcocks* v. *Wilcocks*, (b) in which an order appears to have been made for the sale of commodities seized under a sequestration for want of an answer, it was confined to perishable stock and effects, although the application extended to cattle as well as to the perishable stock. (c)

From the report of *Mitchell* v. *Draper*, (d) it seems that a sale of property taken under a sequestration will not be ordered, unless upon notice; whether such an order can be made without notice upon a sequestration in *mesne process* does not appear; it is, however, to be observed, that if notice is necessary, it can only be where the process has been issued after appearance for want of an answer; where the process is to compel appearance, no personal notice can be given, because there is no person upon whom it can be served, unless the party himself, in consequence of whose keeping out of the way the sequestration has probably been issued.

The application for a sale may be made either by motion or by petition; (e) and it appears from the order in *Wilcocks* v. *Wilcocks*, that it was directed that the sale should take place after a fortnight's notice in the county paper, and that the money (after reasonable expenses deducted, to be ascertained by affidavit of the sequestrator,) should be paid into the Bank to the credit of the cause. (f)

Besides the effect which a sequestration has upon the goods and chattels of the defendant, the writ, as we have seen, authorizes the sequestrators to enter upon all messuages, lands, tenements and real estates, and to collect, take and get into their hands the rents and profits thereof.

Under this authority the sequestrators may enter into the possession of such [*641] parts of the defendant's real estate as are *in his own occupation, whether freehold or copyhold. (g) They may also enter into the

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(x) 1 Ves. 179, 184. (y) 1 Ves. jun. 86.
(z) 3 Bro. C. C. 72.
(a) *Vide* Knight v. Young, 2 Ves. & B. 184, in which also it was stated by Mr. Richards, Reg., that instances could be produced where the Court, having put sequestrators upon *mesne process* into possession, acted upon it, by paying the costs out of the property seized, directing a sale for that purpose.
(b) Amb. 421.
(c) *Vide* Mr. Blunt's edition of Ambler, vol. 1, 421, n. (1).
(d) 9 Ves. 208. (e) Ibid. Wilcocks v. Wilcocks, Amb. 421.
(f) Lib. Reg. 1761, B. fo. 340, b.; Blunt's Ambler, 421, n.
(g) 1 Barnard. 431; Coulston v. Gardiner, 2 Cha. Ca. 76; 3 Swanst. 279, n. S. C. In the Marquis of Caermarthen v. Hawson, the Court of Exchequer appears to have doubted whether they could revive a sequestration against the heir to copyhold lands, on account of the difficulty of compelling the lord to admit the sequestrators, and also by reason of the lord's right to the fine, &c., 3 Swan. 398. n.

receipt of the rents and profits of such estates as are in the occupation of tenants. There appears to have been formerly some doubt whether upon a sequestration in *mesne process* the Court would order the tenants upon the land to attorn to the sequestrators. The doubt rose in consequence of the decision reported to have been pronounced in *Rowley* v. *Ridley*, (*h*) in which it is stated that the Lords Commissioners of the Great Seal had ordered tenants to attorn to sequestrators upon *mesne process*, but that Lord Thurlow had afterwards refused to enforce that order. It seems, however, from the statement of that case by the Solicitor General, (*i*) in *Simmonds* v. *Kinnaird*, (*k*) that Mr. Dickens' report is erroneous, and that the ground upon which Lord Thurlow had refused the order had been mistaken. It appears from that statement, as well as from the note of the case in Lord Colchester's manuscripts, (*l*) that Lord Thurlow was of opinion that such an order could be made, although, under the circumstances of that particular case, the application was premature, having been made before the sequestration was returned. (*m*)

The sequestrators upon entering upon a defendant's estate should serve the tenants in possession with a notice in writing to attorn and pay their arrears and growing rents to them, which may be done either, personally by the person serving the tenant and at the same time showing him the sequestration under seal, or by leaving the notice at his dwelling-house with some of his family, together with a copy of the sequestration, and showing the original writ to the person served. (*n*)

If the tenant refuse to attorn, the proper course, according *to Lord Thurlow's opinion in *Rowley* v. *Ridley*, is to cause the [*642] sequestrator, before the motion is made, to make a return of the names of the tenants, and of their refusal to attorn, and then to move, "*upon notice to the tenants*," (*o*) that they may be ordered to attorn and pay their rents to the sequestrators. (*p*) This order should be made upon the tenants by name, and not upon the tenants of the defendant generally. (*q*)

We have seen before, that sequestrators may take possession of lands, &c., in the defendant's own occupation. It seems also, that where the sequestration is for the non-performance of a decree, the Court will, upon proper application, give them authority to set and let the property; (*r*) but no such authority will be given where the sequestration is upon *mesne process*. (*s*)

A fraudulent alienation of property will not prevent the effect of a sequestration. (*t*) This point, however, will be more fully discussed hereafter, when we come to treat of the process by which the decrees and orders of the Court may be enforced. It may, nevertheless, be observed here, that where, upon a motion for a writ of assistance to enforce an injunction to put sequestrators into posses-

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(*h*) 2 Dick. 622.
(*i*) Lord Redesdale, then Sir J. Mitford.
(*k*) 4 Ves. 735, 738.
(*l*) 3 Swanst. 306, n. (*b*) S. C.
(*m*) It seems that at law, notwithstanding attornment, tenants holding under leases may dispute the title of the sequestrators, unless they have received possession from them. *See* Cornish v. Searell, 8 Barn. & Cress. 475. *Quære*, whether this will apply to tenants at will?
(*n*) *Vide* Shaw v. Wright, Reg. Lib. 1795, B.
(*o*) In the Court of Exchequer the practice appears to be for the Court in the first instance to make an order upon the tenants to show cause why they should not attorn. Rowley v. Corp. of Bridgewater, 1 Fowl. Ex. Pr. 157.
(*p*) 4 Ves. 738; 3 Swanst. 306, n.; (*b*) *vide etiam* Anon. 2 Cha. Ca. 163.
(*q*) Anon. 2 Cha. Ca. 163.
(*r*) Neale v. Bealing, 3 Swanst. 304, n.; (*c*) Harvey v. Harvey, 2 Cha. Rep. 49.
(*s*) Ray v. ———, 3 Swanst. 306, n. (*a*)
(*t*) Coulston v. Gardiner, 2 Cha. Ca. 43; 3 Swanst. 279, n. S. C.; Witham v. Bland, ib. 277, n.; (*a*) Bird v. Littlehales, ib. 299 n.; (*a*) Hamblyn v. Ley, ib. 301, n.; (*a*) and *vide post*, "Process to enforce Decrees."

sion of the house and goods of the defendant, the defendant alleged that he had assigned the house and goods to A. B. for a valuable consideration, it was ordered that A. B. should be examined *pro interesse suo*, unless he showed cause to the contrary at the next seal. (*u*)

Sequestrators upon *mesne process* are accountable for all that they receive, and can only retain so far as to satisfy for the contempt. (*x*) They are bound from time to time to make returns to the Court of what comes to their hands [*643] under the *sequestration. (*y*) and if they omit to do so, they will not be permitted to set off their fees. (*z*)

Upon the sequestrators returning that they have money in their possession, the Court will, upon application, order it to be paid into the name of the Accountant General, to the credit of the cause, and invested. Thus, in *Howell* v. *Lord Coningsby*, (*a*) an order was made, upon the return of a sequestration for want of appearance, that the costs should be taxed and retained by the sequestrators out of the money received by them, and that the rest should be brought into Court. Where the money is in Court, it must, as we have seen, remain there till the defendant has appeared or answered and cleared his contempt, when whatever has been seized by virtue of the sequestration will be accounted for and paid him, after deducting therefrom the costs of his contempt. (*b*)

It is said that a receiver being truly and properly the hand of the Court, the Court will put him in possession, in a summary way, and order the tenants to attorn to him, and will grant him a writ of assistance, without in the first case awarding an injunction for the possession, (*c*) which in other cases is the usual process. (*d*) To this case the learned author of the treatise on the Forms of Decrees in this Court subjoins a *quere*, Whether the like order would not be made in the case of a sequestrator? and in corroboration of his conjecture, it may be added, that in Mr. Fowler's Practice of the Court of Exchequer (*e*) there occurs the form of a writ of assistance to sequestrators, which appears to have been taken from one actually issued. There can be little doubt, therefore, that, according to the practice of the Exchequer, such a writ may be issued; and there appears no reason why a similar practice should not exist in the Court of Chancery. In *Bird* v. *Littlehales*, (*f*) however, it appears that previously to the issuing of the writ of assistance, an injunction had been issued to the defendant to deliver possession to the sequestrators.

[*644] *It is clearly a contempt of the Court to disturb sequestrators in their possession of property taken under the sequestration; (*g*) and where sequestrators have been forcibly dispossessed, the Court will award an injunction to compel the restitution to them of that of which they have been dispossessed.

The proper course to be pursued by any person who claims title to an estate or other property sequestrated, whether by mortgage or judgment, lease or otherwise, or who has a title paramount to the sequestration, is to apply to the Court to direct the plaintiff to exhibit interrogatories before one of the Masters, in order that the party applying may be examined as to his title to the estate. (*h*)

(*u*) Bird v. Littlehales, *ubi supra*.
(*x*) Gibson v. Scevington, 1 Vern. 247.
(*y*) Desbrow v. Crommie, Bunb. 272.
(*z*) Hawkins v. Crook, 3 Atk. 594.
(*a*) 1 Fowl, Ex. Pr. 161.
(*b*) *Ante*.
(*c*) Sharp v. Carter, 3 P. Wms. 379.
(*d*) Ibid. *notis*.
(*e*) Vol. 1, 161.
(*f*) 3 Swan. 299, n. (*a*).
(*g*) Angel v. Smith, 9 Ves. 336; Lord Pelham v. The Duchess of Newcastle, 3 Swanst. 290, n.
(*h*) The mode of proceeding is the same where the property is in the possession of a receiver. Anon. 6 Ves. 287; Angel v. Smith, 9 Ves. 336; Brooks v. Greathed 1 J. & W. 178.

An examination of this sort is called an examination *pro interesse suo*, and an order for such an examination may be obtained by a party interested, as well where the property consists of goods and chattels or personalty, as where it is real estate. (*i*) Thus in *Martin* v. *Willis*, (*k*) a person claiming title to goods seized under a sequestration obtained an order that the party prosecuting it might exhibit interrogatories against him to examine him *pro interesse suo*, and in the meantime that the goods might be restored to him on his giving security.

An order for the examination of a party *pro interesse suo* may be obtained as a matter of course by the party claiming, (*l*) but it cannot be granted till after the sequestrators have made a return, because till then, it cannot appear to the Court what is sequestered. (*m*)

The application may be made either by motion or petition. (*n*) If made by the former, it should be supported by affidavit, stating the facts under which the claim arises. If made by the latter, the petition ought to state the circumstances of the *case. In *Lord Pelham* v. *The Duchess of Newcastle*, (*o*) upon Lady Henrietta Holles moving that she might be [*645] admitted, by guardian, to be examined *pro interesse suo* touching money in a banker's hands, and other things sequestered upon process against a party in the cause, she was directed to put her suggestions into an order, and to specify what she claimed title to, and how, and the banker was ordered to give the plaintiff a copy of the account on which the balance in his hands that was sequestered arose, to the end that the plaintiff might the better know how to form proper interrogatories.

Some doubt appears to exist as to whether a plaintiff can compel a claimant to be examined *pro interesse suo*; and in *Kaye* v. *Cunningham*, (*p*) Sir J. Leach, V. C., said that the Court has no authority to compel a party to be so examined, and that such an order could only be made upon the application of the party, or with his consent. But in *Bird* v. *Littlehales* (*q*) an order appears to have been made for a person to be examined *pro interesse suo*, on the application of the plaintiff, and similar orders were pronounced in *Hamlyn* v. *Lee*, (*r*) and in *Johnes* v. *Claughton*. (*s*) In the two last cases the parties claiming the property had commenced ejectments to recover the possession of it, and it formed part of the orders that they should be restrained from proceeding in such actions; but in *Bird* v. *Littlehales* no ejectment had been commenced, but the order was made in consequence of the defendant's counsel having stated, in answer to an application for a writ of assistance, that the defendant had assigned the property for a valuable consideration to A. B., whereupon the Court directed that A. B. should be examined *pro interesse suo*, unless he showed cause to the contrary at the next seal; it was also ordered that the defendant should, within two days, give the plaintiff notice of A. B.'s place of abode. (*t*)

From the above cases of *Hamlyn* v. *Lee*, and *Johnes* v. *Claughton*, *it appears that where sequestrators or a receiver are in the [*646]

(*i*) Lord Pelham v. The Duchess of Newcastle, 3 Swanst. 290, n.

(*k*) In Scacc, 10 May, 1745. *Vide* 1 Fowl. Ex. Pr. 160, where it is stated that this order was directed by the Court to be made, similar to that in Mackenzie v. The Marquis of Powis, 6 July, 1739, which was settled by the Court.

(*l*) Lord Pelham v. The Duchess of Newcastle, 3 Swanst. 290.

(*m*) Ibid.

(*n*) Hunt v. Priest, 2 Dick. 540.

(*o*) 3 Swanst. 290. It is to be observed that this was a sequestration for not obeying an order. *Vide* also the observation of Sir L. Shadwell upon this case, in Johnson v. Chippindall, 2 Sim. 55.

(*p*) 5 Mad. 406.

(*q*) 3 Swanst. 299, 300, n. (*a*).

(*r*) Seton on Decrees, 413.

(*s*) Jac. 573.

(*t*) Reg. Lib. A. 1742, fo. 187.

possession of property belonging to a defendant, and a party claiming that property adversely to the defendant brings an action of ejectment against the sequestrators or receiver, for the purpose of enforcing his claim, the Court will interfere by injunction to prevent the party claiming from proceeding with the ejectment; for although the Court will sometimes permit the party to proceed at law against the sequestrators or receiver, where a matter is in a fit state for the right to be ascertained by a trial at law, (*u*) such a proceeding cannot be adopted unless the permission of the Court has been first obtained. This was settled in *Angel* v. *Smith*, (*x*) where the rule was laid down, both with respect to receivers and sequestrators, that their possession is not to be disturbed without leave. (*y*)

It has sometimes happened that where a party claiming a legal right to property sequestered has made an application to be examined *pro interesse suo*, the Court, instead of the order prayed, has given the party leave to try his title at law, either by ejectment or in such other manner as may be necessary, for the purpose of deciding the point; (*z*) and sometimes the Court, without directing either an examination *pro interesse suo* or a trial at law, have at once referred it to the Master to inquire whether the party claiming is entitled to any interest in the property; and where the right of the party has been clear and undisputed, the Court has at once made the order in his behalf, without either directing an examination *pro interesse suo* or referring it to the Master to inquire into the existence of the right. Thus in *Dixon* v. *Smith*, (*a*) where the landlord of certain leasehold property which had *been taken under a sequestration applied to the Court that out of certain money standing in the name of the Accountant General (being the rents and profits of the leaseholds in question, which had been paid in by the sequestrators) the amount due for arrears of rent might be paid to him, or that he might be at liberty to go in before the Master to be examined *pro interesse suo*, Lord Eldon said, that in a clear case the Court would not send the parties into the Master's office, merely that they may return with their rights as plain as when they went in, and accordingly ordered the amount of the rent due to the landlord to be paid out of the fund in Court. And so in *Dickinson* v. *Smith*, (*b*) where a motion was made for payment, out of a fund in Court paid in by sequestrators (being the produce of growing crops on a farm) of a sum due to the party in respect of a composition for tithes, the Vice Chancellor, Sir J. Leach, although he refused the motion, because a composition for tithes was merely a personal demand and gave no *lien* upon the land, said that if tithes had been due in respect of the produce of the land taken by the sequestrators, the motion would have been correct, for the sequestrators would not be justified in taking the produce of the land without paying the tithes.

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But, in general, where personal property belonging to a third person has been sequestrated, the Court will not make an order for its restoration upon affidavit,

(*u*) Attorney General v. Mayor of Coventry, 1 P. Wms. 308. Anon. 6 Ves. 288; Angel v. Smith, 9 Ves. 335; Brooks v. Greathed, 1 J. & W. 178.

(*x*) *Ubi supra*. (*y*) Brooks v. Greathed, *supra*.

(*z*) Attorney General v. Mayor of Coventry, 1 P. Wms. 308, Walker v. Bell, 2 Mad. 21. The report of this case is confined to what took place upon the presentation of a petition to confirm the Master's report, made in pursuance of a previous order of the 20th April, 1815, whereby it was referred to the Master to inquire whether the parties claiming were mortgagees of the property sequestered, &c. Upon reference to the Registrar's book it appears that such order was made upon the hearing of two petitions, which had been presented by the parties, praying that they may be examined *pro interesse suo*. Reg. Lib., 1814, B. 1349; (*b*) *vide etiam* Brooks v. Greathed. 1 J. &. W. 178.

(*a*) 1 Swan. 457.

(*b*) 4 Mad. 177. *Vide etiam* the observations of Parker, C. J. in Attorney General v. Mayor of Coventry, 1. P. Wms. 308.

but will direct the party to be examined *pro interesse suo;* (c) the Court has, however, ordered the possession of the property claimed to be delivered up to the claimant, upon his entering into good and sufficient security to restore it in case the decision upon his claim should be against him. (d)

An infant may be admitted to be examined *pro interesse suo* by guardian; (e) and, as we have seen, a person may be admitted to make out his claim by means of such an examination *in formâ pauperis.* (f)

*In all orders for the plaintiff to examine a party *pro interesse suo*, there should be a time limited within which the interrogatories [*648] must be exhibited. (g) The interrogatories must be settled by the Master, (h) and if the claimant, after the interrogatories have been exhibited and settled, neglect to put in his examination, the Court will order him to do so, and to procure the Master's report within a time specified. (i)

When the examination has been put in, the plaintiff, if he disputes its truth, must reply to it. If it be not replied to, it will be conclusive, (k) and the claimant may then apply for a reference to the Master to look into the interrogatories and the examination, and to certify whether the claimant has made out a title or not. (l)

If the examination is replied to, leave will be given to either party to examine witnesses, and this will be done by order, made upon motion, without notice. (m) Where the witnesses are resident above 20 miles from London, it may also form part of the order, that the party applying for leave to examine witnesses may take out a commission, in which the other may join if he thinks fit. (n) Where the witnesses are in London, or within 20 miles of it, the examination must be before the examiners.

When the commission is returned, or the witnesses, if there is no commission, have been examined, publication passes by order; (o) an order is then made to refer it to the Master, to look into the examination and depositions, and to certify whether the claimant hath made out any and what interest in the premises, or in any and what part thereof. (p) Some doubt *appears to have been entertained whether this was the correct practice [*649] or whether the merits ought not to be determined at once upon a petition; but Lord Bathurst, after referring to the Registrar to furnish him with cases upon the subject, (which he did) decided that it ought to be referred to the Master. (q)

When the Master has made his report, the case should be set down for hearing upon the report; (r) and it is to be observed, that the Master's report upon a reference of this nature is not one to which exceptions will lie; if either party

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(c) Lord Pelham v. the Duchess of Newcastle, 3 Swanst 290, n.

(d) Wharam v. Broughton, 1 Ves. 180.

(e) Lord Pelham v. Duchess of Newcastle, 3 Swanst. 290, n.

(f) *Ante*, 42.

(g) Hunt v. Priest, 2 Dick. 540. It is presumed that if the interrogatories are not exhibited within the time specified, the Court will, upon application, suspend the sequestration as far as relates to the interest of the claimant.

(h) Bowles v. Parsons, 1 Dick. 142. (i) Cooper v. Thornton, ibid. 72.

(k) Attorney General v. the Mayor of Coventry, 3 Swan. 311, n.

(l) Hamlyn v. Lee; Seton on Decrees, 415; 1 Dick. 94, S. C.; 3 Swan. 301, S. C.; Bowles v. Parsons, 1 Dick. 143. In Fawcett v. Fothergill, 1 Dick. 19, it appears that after a reference made to the Master to certify what proof the claimants had made of their right, upon which the Master had reported, the Court, upon the report coming on to be heard, ordered the plaintiff to reply to the examination.

(m) Rowley v. Ridley, 3 Swan. 308, n. (n) Fawcett v. Fothergill, 1 Dick. 19.

(o) Hunt v. Priest, 2 Dick. 541. (p) Ibid.

(q) Ibid.

(r) Cooper v. Thornton, 1 Dick. 73; Hamlyn v. Lee, 1 Dick. 94.

objects to the Master's finding, the matter should be discussed upon hearing the report. (s)

Upon the hearing of the report, the Court will either make a final order, (t) or send it back to the Master, to make further inquiries or to compute principal and interest upon the amount due to the claimant. (u) If it is sent back to the Master, it may, if necessary, be heard upon further directions. (x)

When it appears that a party who has been examined *pro interesse suo* has a plain title to the property, and is not affected by the sequestration, then it is to be discharged against him, with or without costs, as the Court shall determine upon the circumstances of the case, and so *vice versa*. (y)

A sequestration in *mesne process*, like other processes of contempt, may be discharged upon the party clearing his contempt and paying the costs incidental thereto; (z) but if the bill has been taken *pro confesso* and a decree made *ad computandum*, the Court will not, as we have seen, discharge the sequestration on payment of the costs of the contempt only, but will keep it on foot as a security to the plaintiff for the defendant's accounting: (a) whether it can, in such case, be made the means of enforcing the payment of the final balance, by the plaintiff's presenting a petition, (to come on with the cause for further directions) that the sequestrators may account and pay the balance in their hands into Court, has been before discussed. (b) It is to be observed, that where a decree [*650] to *account has been made upon taking the bill *pro confesso* against a defendant, who has appeared but not answered, he may, upon motion, obtain leave to attend the Master for the purpose of being examined, and have the sequestration taken off upon his paying to the plaintiff the costs of the suit, including the costs of the contempt and of the application. (b)

Where sequestrators are in the possession of lands or tenements in question in the cause, the appointment of a receiver of the rents and profits of those lands will have the effect of discharging the sequestration. (c)

A sequestration against a defendant upon *mesne process* abates on the death of the plaintiff, but it is revived with the suit; (d) and the Court will not, immediately upon the abatement, turn the sequestrators out of possession, but will give time for the revival of the suit. (e)

Where the defendant himself against whom the sequestration has issued dies, the process, being personal, not only abates but falls altogether, and cannot be revived; though it is otherwise where it has issued for non-performance of a decree. (f)

Sequestrators will be ordered, upon petition or motion, to account before a Master for their receipts under the sequestration, and for that purpose interrogatories may be exhibited for their examination before the Master, their answer or examination to which need not be signed by counsel. (g)

(s) Ibid.
(t) Cooper v. Thornton, *ubi supra*.
(u) Hamlyn v. Lee, *ubi supra*.
(x) Ibid.
(y) Gilb. For. Rom. 81.
(z) 1 Turn. & V. 124.
(a) *Ante*, 635.
(b) *Ante*, 636.
(b) Heyn v. Heyn, Jac. 49.
(c) Ibid.
(d) Hyde v. Forster, 1 Dick. 132.
(e) Per Lord Hardwicke in White v. Hayward, 2 Ves. 461.
(f) Hawkins v. Crook, 3 Atk. 594. As to the effect of the death of the party upon a sequestration for non-performance of a decree, *vide* "Decrees," *post*.
(g) Keene v. Price, 1 S. & S. 98.

Where a sequestrator abuses his power, the Court will, upon representation of the facts, make an order that he shall shew cause on a particular day why he should not be committed and pay the costs to the party complaining. (g)

The costs of a sequestration are not liquidated, but are costs to be taxed by one of the Masters of the Court. Sometimes the sequestrators are allowed a poundage, and sometimes, *under circumstances of trouble and expense, a specific sum *in solido*. (h) In *Wood* v. *Freeman*, (i) an [*651] exception was taken by a sequestrator to a Master's report, because he had allowed him a gross sum, and had not allowed him 6*s*. 8*d*. a day for his trouble; but Lord Hardwicke said he did not remember that 6*s*. 8*d*. was an absolute stated fee to all sequestrators, whether the effects seized under the sequestration were large or small, and that as the sequestrators in the case had not got in 40*l*. in almost two years, he thought that the gross sum the Master had allowed him was sufficient for his trouble.

The Court refused to make an order on a plaintiff to pay a sequestrator his fees who had made no return of the goods sequestered, but had delivered them over many years before, and made no demand upon the plaintiff since; but Lord Hardwicke said, that where a sequestrator has made returns from time to time of what he has seized, he may, if the plaintiff calls for an account of the goods sequestered, set off his fees, whatever length of time has elapsed without demand. (k)

SECTION IX.

Against Peers and other Persons having Privilege of Parliament, Officers of the Court, &c.

It has been before stated, (l) that in the case of a peer of Parliament, or of a member of the House of Commons, whose persons are privileged from arrest, the first process of contempt for non-obedience to the *subpœna*, either by not appearing, or by not answering after appearance, is by sequestration, which will issue as well against an infant peer as an adult; (m) and that the same process is now also resorted to where the party is an officer of the Court, such as the Warden of the Fleet, or a sworn clerk, &c., although formerly the method *of proceeding against them appears to have been by [*652] suspension from office. (n)

In the Court of Exchequer, an order for a sequestration *nisi* was made against one of the barons, who was served with a *subpœna* in the ordinary way, but neglected to enter his appearance. (o)

In order to obtain a sequestration against a peer or bishop, (p) an affidavit must be made of the service of the letter missive, and of the copy of the petition

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(g) Lord Pelham v. Lord Harley, 3 Swan. 291, n.
(h) 1 Turn. & V. 125.
(i) 2 Atk. 542.
(k) Hawkins v. Crook, 3 Atk. 594.
(l) *Ante*, 573.
(m) 1 Cha. Ca. 16.
(n) *Vide* Hind. 143, and Corbyn v. Birch, 2 Dick. 635, where the reasons for proceeding by sequestration instead of suspension are stated.
(o) Tooke v. Sir John Fortescue Acland, 15 July, 1745, 1 Fowl. Ex. Pr. 173.
(p) Formerly, if a peer of the realm appeared and did not answer, an attachment lay, but now, by order of Parliament, no process lies but a sequestration. Hind. 131.

upon which it has issued, and also of the service of the *subpœna*, and of the copy of the bill. Where the process is required against a member of the Commons' House of Parliament, the affidavit need only verify the service of the *subpœna*. A motion must then be made for a sequestration against *the defendant's* real and personal estate, which the Court orders of course *nisi*, (that is) *unless the defendant, being personally served with the order, shall within eight days after such service show unto the Court good cause to the contrary.* The defendant must be served personally with this order, and if he persist in refusing to appear, then an affidavit of service must be made, and counsel instructed to move to make the order absolute. It is to be observed, that where an order *nisi* for a sequestration against a peer or member of the House of Commons, for want of an answer, has been obtained, it is good cause to show against making such order *nisi* absolute, that the answer has been put in. In *Lord Clifford's* case, (*q*) Sir Joseph Jekyll, M. R., laid it down, that if there be a sequestration *nisi* against a peer for want of an answer, and the peer puts in an answer which is insufficient, yet the order for a sequestration shall not be made absolute, but a new sequestration *nisi* must be issued; and in this his Honor was confirmed by Mr. Goldsborough, who was then the Registrar. In a subsequent case, however, before Lord Hardwicke, his Lordship said, that if there be a sequestration *nisi* for want of an answer against a [*653] member of Parliament, and he puts in an answer before the order is made absolute, and exceptions are taken to this answer, the Court will enlarge the time for showing cause till it shall appear whether the answer is sufficient or not. (*r*)

When the order for making the sequestration absolute is drawn up, passed and entered, the plaintiff's clerk in Court will make out the sequestration, the order being left with him, and this sequestration the Court will not discharge till the party has appeared and paid the costs of the process; and then he may move to discharge the sequestration, upon notice to the adverse party if it be executed, which will be granted of course.

Personal service of the order *nisi* may be dispensed with, in cases where a peer, &c. keeps within his own house, or is surrounded by his servants to avoid service, or where the party serving the process is denied access, and it is very difficult and almost impossible to serve the order personally. But in order to enable the plaintiff to dispense with personal service, it is necessary to apply to the Court to substitute a service by leaving, in lieu of it, grounding such application upon a proper affidavit of the particular circumstances of the case, upon which the Court will exercise a discretion, and make the order, if the facts stated in the affidavit are strong enough to warrant such a proceeding. (*s*)

Where a peer defendant avoided the service of an order *nisi* for a sequestration, the Court of Exchequer made an order that service thereof upon his clerk in Court, and at his dwelling-house, or if no person should be met with there, by fixing a copy of the order on the door, should be good service. (*t*)

(*q*) 2 P. Wms. 385.

(*r*) Butler v. Rashfield, 3 Atk. 740. From the observation of the reporter appended to this case, it may be inferred that upon the authority of what the Registrar had said in Lord Clifford's case, Lord Hardwicke had allowed the cause shown, as being the course of the Court; but upon reference to the Registrar's book, where the order is entered under the title of Buller v. Rashleigh, it appears that the time for showing cause was enlarged till the next seal. Reg. Lib. 1750, A. 495, (*b*).

(*s*) Hind. 81.

(*t*) Mackenzie v. Marquis of Powis, Scacc. 19, May, 1739, 1 Fowl. 173. In Smallbrooke v. Lord Donegal, 3 Anst. 647, it appears to have been stated by the officers of the Court of Exchequer that service of an order *nisi* for a sequestration for want of an answer

*In *Thomas* v. *Lord Jersey*, (*u*) a bill was filed against Lord Jersey, upon which a letter missive with a copy of the bill, was [*654] served on the defendant, by leaving it with one of his female servants at his residence in Berkeley-square. His Lordship was then abroad, having left England for the Continent a few months preceding. On his neglecting to appear to the letter missive, a *subpœna* was served in the same way, and upon his non-appearance to that, an order *nisi* for a sequestration was issued, when, upon inquiry at his Lordship's house, it appeared that he was still on the Continent, and thereupon, on an affidavit being made of these facts, the Vice Chancellor directed that service of the sequestration *nisi* at his Lordship's house should be good service; and upon a subsequent motion to discharge the Vice Chancellor's order, the Lord Chancellor, Lord Brougham, refused the motion. (*x*)

The same course of proceeding in suing out and issuing the sequestration is observed where it is sought against an officer of the Court as in the case of peers, with the exception that the affidavit upon which the order *nisi* is applied for must be confined to the service of the *subpœna*, there being no letter missive as in the case of a peer, &c.

The form of the sequestration issued against peers and other privileged persons is nearly the same as that issued in cases of contempt by ordinary persons, with the exception that it recites the order *nisi*, and the order for making it absolute.

The manner of issuing and executing it, and the consequences arising from it, are similar to those of ordinary sequestrations, as detailed in the preceding Section.

By the statute 1 Will. 4, c. 36, s. 12, after reciting that in many cases persons having privilege of Parliament are named as defendants in suits instituted in Courts of Equity against them, either alone or jointly with other persons, for enforcing against them demands and duties cognizable in Courts of Equity, and that in some cases such defendants having privilege of Parliament, have stood out to the return of process of sequestration issued against them for enforcing appearance, and such process of sequestration hath not been found sufficient to enforce such appearance, it is therefore enacted, that [*655] *from and after the passing of the Act, in case any defendant having privilege of Parliament shall upon a return of process of sequestration issued against him for not putting in an appearance to any original or other bill of complaint instituted against him in a Court of Equity for enforcing discovery and relief, or discovery alone (as the case may be) neglect to appear, that then and in such case such Court, upon producing the return of such sequestration in Court, may, on the motion or other application of the plaintiff in such cause, appoint a clerk in Court to enter an appearance for such defendant so having privilege of Parliament, and such proceedings may thereupon be had in the cause as if the party had actually appeared. (*y*)

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by a privileged person upon the clerk in Court is sufficient, and that the absolute order alone requires personal service. *Sed. qu.*

(*u*) 2 M. & K. 398.

(*x*) *Vide* Attorney General v. Earl of Stamford, 2 Dick. 744.

(*y*) For the process of taking bills *pro confesso* against privileged persons under this Act, *side post*, chap. ix.

SECTION X.

Of the Effect of a Contempt upon the Proceedings in the Cause.

Besides the personal and pecuniary inconvenience to which a party subjects himself by a contempt of the ordinary process of the Court, he places himself in this further predicament, viz: that of not being in a situation to be heard in any application which he may be desirous of making to the Court.

Lord Chief Baron Gilbert lays it down, that "upon this head it is to be observed, as a general rule, that the contemner, who is in contempt, is never to be heard, by motion or otherwise, till he has cleared his contempt, and paid the costs: as, for example, if he comes to move for anything, or desires any favour of the Court, if the other side says or insists that he is in contempt, though it is but an attachment for want of an answer, he is not entitled to be heard till he hath paid the costs (however small they are;) he must first pay them to the party or his clerk in Court, and produce a receipt for them in open Court, before he can be heard; and this is always allowed as good cause against [*656] hearing of the contemner in any case *whatsoever." (z) Upon this principle, it is held that where defendants are in contempt for want of an answer, and an injunction has been granted till answer, they cannot, before the answer is put in, be in a situation to make any application to the Court, either to cut down or to dissolve the injunction. (a) And so in *Lord Wenman* v. *Osbaldiston*, (b) where a defendant, being in contempt for not putting in his examination pursuant to an order, in order to avoid a sequestration, moved the Court that upon his undertaking to pay in a week's time what should appear to be due to the plaintiff, all further process of contempt should be stayed, the Court declined making any order upon the motion, but directed the appellant to clear his contempt, and then move. And this determination of the Court was affirmed by the House of Lords upon appeal.

In like manner it has been held, that a mortgagee, defendant to a bill of foreclosure, who is in contempt, cannot move under the 7 Geo. 3, c. 20, for a reference to the Master to take an account of the principal, interest, &c., due upon the mortgage. (c) And so where a party in contempt had applied for and obtained the costs of an abandoned motion under Lord Eldon's order, the Vice Chancellor, upon motion, discharged the order. (d)

It is to be observed, however, that the rule, that a party cannot move till he has cleared his contempt, is confined to proceedings in the same cause, and that a party in contempt for non-obedience to an order in one cause will not be, thereby, prevented from making an application to the Court in another cause relating to a distinct matter, although the parties to such other cause may be the same. (e)

And although it is the general rule of the Court that parties must clear their contempt before they can be heard, yet the rule must not be understood as preventing their making application to the Court to discharge the order, by their [*657] non-obedience to which their contempt has been incurred, on the *ground of irregularity. Therefore, where a defendant in custody for a contempt in not obeying an order to pay in money, applied to the Court to discharge him out of custody, on the ground of irregularity in the order (it

(z) Gilb. For. Rom. 102. *Vide* acc. Vowles v. Young, 9 Ves. 173.
(a) M'Cullum v. Beale, 10 Pri. 130.
(b) 2 Bro. P. C. 276; 2 Eq. Ca. Ab. 222, p. 1.
(c) Hurtt v. M'Cartney, 13 Ves. 560. (d) Ellis v. Walmsley, Law J. 1835, 60.
(e) Clarke v. Dew, 1 R. & M. 103.

having been made pending an abatement of the suit,) he was not only heard, but the order for his discharge was made, though, under the circumstances, without costs. (*e*) In such cases, it is to be observed, that in making his application, the party in contempt ought to confine his motion to the object of getting rid of the order of which he complains, and that if he embraces other matters in his notice, he will not be allowed to go into such other matters till he has shown that the order, upon which his contempt has been incurred, was irregular. Upon this principle, as the defendant in the above case, in his application to the Court to discharge the order upon which his contempt was incurred, included in his notice of motion the discharge of several subsequent orders upon which he had likewise incurred further contempts, Lord Cottenham was of opinion that he ought, in the first instance, to be confined to that part of his notice of motion which asked the discharge of the order upon which his first contempt was incurred, and upon his failure in inducing the Court to discharge that order, his Lordship refused to hear the residue of the motion. (*f*)

It is also to be observed, that the circumstance of a party being in contempt will not prevent his being heard in opposition to any special application which the other side may make, upon notice duly served upon him. And where a plaintiff had obtained, from the Vice Chancellor, an order against a defendant who was in contempt for payment of a sum of money into Court, the Lord Chancellor allowed him to move to discharge that order, on the ground that it was a rehearing of the original application. (*g*)

We have seen before, (*h*) on the authority of Lord Chief Baron Gilbert, that under the old practice of the Court, a defendant, in contempt to an ordinary attachment, could plead to *the bill, or obtain a *dedimus potestatem* to take his answer in the country; but that after a contempt prose- [*658] cuted to *an attachment with proclamations returned*, no commission to answer could be granted, nor any plea admitted, but upon motion in Court, and affidavit made of the party's inability to travel, or other good matter to satisfy the Court respecting the delay. (*h*) And from what has been before stated, it appears to have been Lord Chief Baron Gilbert's opinion that the practice of the Court was to admit a demurrer, as well as a plea or commission, notwithstanding an ordinary attachment had been issued; but in *Mellor* v. *Hall* (*i*) the late Vice Chancellor, Sir J. Leach, decided that a demurrer ought not to be received after the first attachment, and ordered one which had been filed, upon tender of the costs of the contempt, to be taken off the file. All doubt, however, upon this subject, with regard to demurrers, has been set at rest by Lord Brougham's orders, by which it is provided that in every cause where an original or supplemental bill, or bill of revivor shall be filed, a defendant shall, after appearance, be allowed twelve days only to demur alone to any such bill. (*k*)

By this order the period, after which a demurrer to the whole bill can be filed, is made to depend upon the number of days which have elapsed after the appearance has been entered, and not upon the question whether the party be in contempt or not; there is still, however, a portion of the old practice connected with this subject, which does not appear to be affected by the above order, viz: the right of a defendant against whom an attachment has been issued for want of an answer to put in a demurrer to part of the bill, and answer or plead as to the rest. This, Lord Eldon, after much consideration, decided he could not do. (*l*) His Lordship also decided, that, in such a case, the proper

(*e*) Wilson v. Metcalfe, MSS.
(*f*) Ibid.
(*g*) Parker v. Dawson, Law. Journ. 1836, 108.
(*h*) *Ante*, p. 608, 609.
(*h*) For. Rom. 71; Beame's Ord. 178.
(*i*) 2 S. & S. 321.
(*k*) Ord. 31 Dec. 1833.
(*l*) Curzon v. De la Zouch, 1 Swanst. 185.

course to be pursued is to move that the demurrer and answer should be taken off the file, and not to move that the demurrer may be over-ruled. (*m*)

[*659] *It is to be noticed that as a party is not considered as actually in contempt till the attachment in sealed, a demurrer coupled with an answer, may be filed at any time before that process has taken place. This was the rule of the Court with regard to demurrers before the alteration of practice effected by the order above referred to. (*n*)

With respect to the right of a defendant in contempt to put in a plea, or to obtain a commission to put in his answer, no alteration has been made in the practice, as stated by Lord Chief Baron Gilbert, and before referred to, so that a defendant, who is only in contempt to the first attachment, may still file a plea, or obtain a common *dedimus*, without previous application to the Court; but after an attachment with proclamations *returned*, he must apply to the Court to show that his plea is proper, and exhibit a proper excuse for his delay. (*o*) And in *Newton* v. *Dent* (*p*) Lord Hardwicke ordered a plea of a former suit depending which had been put in by a defendant, against whom an attachment with proclamations had been issued and *returned*, to be discharged for irregularity.

It is to be observed, however, that if, after being in contempt to an attachment with proclamations *returned*, the defendant succeeds in obtaining an order for time to answer, or a commission to take his answer, he may, under such order, put in a plea upon oath, although the order for time or the commission do not express that he is to answer or plead; a plea upon oath, being considered as equivalent to an answer. (*q*) A plea not upon oath, however, such as a plea of outlawry, cannot be put in under such an order. (*r*)

[*660] *SECTION XI.

In what manner Contempts in Process may be cleared, waived or discharged.

An ordinary contempt in process, as it is a matter merely between the parties, may be cleared by the contemner doing the act, by the non-performance of which the contempt was incurred, and paying to the other party the costs he has occasioned by his contumacy.

Where process has been issued against a defendant in contempt for want of appearance or answer, but has not been executed, the defendant should enter his appearance or put in his answer, and pay or tender to the plaintiff's clerk in Court the costs of the contempt, if the amount of such costs can be liquidated, as in the case of an attachment, an attachment with proclamations and commission of rebellion. If the amount of the costs cannot be ascertained,

(*m*) Ibid. 193. In Taylor v. Milner, 10 Ves. 444, his Lordship appears to have decided that a demurrer being coupled with an answer could not be taken off the file or over-ruled, but should be expunged; but the practice of the Court appears to have undergone an alteration in this respect, in consequence of the probability that, by an alteration of the record, a prosecution for perjury might be defeated, so that the Court has no security as to the propriety with which the first answer is sworn. *Vide* Edwards v. M'Leay, 2 V. & B. 256.

(*n*) E. I. Comp. v. Henchman, 3 Bro. C. C. 372; Sowerby v. Warder, 2 Cox, 268.

(*o*) Gilb. Form. Rom. 71.

(*p*) 1 Dick. 234. *Vide etiam*, Lloyd v. Gunter, 1 Vern. 275.

(*q*) Roberts v. Hartley, 1 Bro. C. C. 56; 2 Dick. 554; Anon. 2 P. Wms. 264; De Minkuitz v. Udney, 16 Ves. 355.

as in cases where the defendant has been brought up by the messenger, *habeas corpus*, or sergeant-at-arms, or upon a sequestration, he should tender such a sum as will cover their probable amount. (*r*)

If the plaintiff's clerk in Court accepts the costs so tendered, it will be at the plaintiff's own risk, if he afterwards puts the process into execution. If the plaintiff's clerk in Court refuses to accept the costs when tendered, it is necessary, in order that the defendant may be discharged from his contempt, that he should obtain an order for that purpose, otherwise the contempt will continue. An order of this nature is made as of course upon the Six Clerks' certificate of the defendant's appearance or answer, and of the payment or tender of the plaintiff's costs of the contempt. (*s*)

Where the process has been carried into effect, and the defendant is in actual custody, he cannot be discharged without an order, to be obtained in a similar manner either upon motion or petition.

*It is to be observed, that where process of contempt has been issued against a defendant for want of an answer, he is entitled to [*661] be discharged from his contempt immediately upon his putting in an answer, and paying or tendering the costs of his contempt; (*t*) and the Court will not detain him in custody till the sufficiency of his answer has been decided upon, (*u*) unless he has already put in three answers which have been reported insufficient. And even where an answer had actually been referred for insufficiency, the Court, upon tender of the costs, made an order for the defendant's discharge, pending the reference. (*x*) An order of this nature may be obtained by motion, *ex parte*, upon production of the Six Clerks' certificate of answer filed, and of the tender of costs. If, however, the plaintiff takes exceptions to the answer, and the answer is reported insufficient, he will be entitled to resume the process of contempt where it left off; (*y*) and so he will where the defendant submits to answer the exceptions. (*z*)

According to the old practice, however, this could not be done where the plaintiff or his solicitor had accepted the costs of the contempt, as such acceptance was considered as a waiver of the contempt on the part of the plaintiff, and he could not afterwards take up the process, but was obliged to begin *de novo*. (*a*) But as this course appeared, to the commissioners for inquiring into the practice of the Court, to be directly at variance with an order, made in the time of Lord Nottingham, (*b*) (by which it was ordered that in [*662] cases of this description, *where frivolous or insufficient answers

(*r*) Philips v. Gibbons, 1 V. & B. 184. (*r*) Broughton v. Martyn, 4 Bro. C. C. 296.

(*s*) Green v. Thomson, 1 S. & S. 121; Gray v. Campbell, 1 R. & M. 323; Edmonson v. Heyton, 2 Young. & C. 3.

(*t*) Under the old practice the defendant might be discharged after three insufficient answers, upon putting in a fourth answer. Bailey v. Bailey, 11 Ves. 151; Farquharson v. Balfour, 1 S. & S. 72; 1 Turn. & R. 184. But upon the fourth answer being reported insufficient, interrogatories might be exhibited for his examination before a Master, and the defendant was ordered to stand committed till he had answered the interrogatories; but now he can only be discharged from custody upon the third answer; if that answer is reported insufficient he must be examined upon interrogatories, and committed till he has answered them. Ord. 1828; Ord. 10.

(*u*) Dupont v. Ward, 1 Dick. 133; Child v. Brabson, 1 Ves. 110.

(*x*) Boehm v. De Tastet, 1 Ves. & B. 324; Gray v. Campbell, 1 R. & M. 523.

(*y*) Anon 2 P. Wms. 481; ibid. Wallop v. Brown, 4 Bro. C. C. 212; Bromfield v. Chichester, 1 Dick. 379; Bailey v. Bailey, 11 Ves. 151; Boehm v. De Tastet, 1 V. & B. 324; Coulson v. Graham, 1 V. & B. 331.

(*z*) Waters v. Taylor, 16 Ves. 417.

(*a*) Haistwell v. Grainger, 1 Eq. Ca. ab. 351; Anon. 2 P. Wms. 481; Hill v. Turner, 2 Ves. & B. 372.

(*b*) A. D. 1746; Beames' Order, 249.

were put in, and any former process of contempt should have issued against the defendant for want of appearing or answering, the plaintiff might resort to such process of contempt, and proceed thereupon, notwithstanding the costs of such former process were paid on the coming in of such insufficient or frivolous answer, &c.,) (c) and as it was held by the commissioners, that as it must occasion delay to an innocent party, to compel him to begin the process *de novo*, and that the circumstance of his accepting those costs, which the rule of the Court gave him, was anything but a satisfactory reason why he should be actually punished by being put to the inconvenience of commencing his process again, it seemed expedient to them to recommend the revival of the order of 1676, so that the plaintiff might resume the process where he left off, in cases where he should have occasion again to resort to it in consequence of the answer proving insufficient. (d) A proposition to this effect was accordingly introduced into their report, (e) in pursuance of which the 24th of Lord Lyndhurst's orders was framed, by which it was provided "that where a defendant in contempt, for want of answer, obtains upon filing his answer the common order to be discharged as to his contempt, on payment or tender of the costs thereof, *or the plaintiff accepts the costs without order*, he shall not by such acceptance be compelled, in the event of the answer being insufficient, to recommence the process of contempt against the defendant, but shall be at liberty to take up the process at the point to which he had before proceeded. (f)

If a defendant is in custody, and the plaintiff permits him to be discharged on payment of the costs of the contempt, upon his promising to put in an answer, and no answer is put in, the plaintiff must proceed by a new attachment, to sanction which a previous order appears to be necessary. (g)

[*663] *But although a plaintiff does not now, by accepting the costs, from a defendant upon his putting in an answer, forfeit his right to recommence the process of contempt at the point where it left off; yet if, after answer put in, he accepts the answer, or takes a step in the cause, he waives the contempt, and cannot renew the process or take any other advantage of it. Thus, if a plaintiff moves upon an admission in the answer he waives the contempt; (h) and so where a messenger had been ordered upon a *cepi corpus*, and in the meantime the defendant filed his answer, which the plaintiff accepted, and then applied for his costs by motion, it was held that the acceptance of the answer precluded him from his right to costs. (i) And so where a defendant who was in contempt put in an answer without paying or tendering the costs, and the plaintiff replied to the answer, but did not proceed with the cause for three terms, whereupon the defendant moved to dismiss the bill for want of prosecution; upon the plaintiff's objecting that the defendant could not make the motion, in consequence of his being still in contempt, Lord Eldon held that the contempt was gone, and that the defendant was in a situation to make the motion. (j)

In that case another question was raised whether the plaintiff, by accepting the answer, had lost his right to the costs of the contempt; but Lord Eldon, on the authority of the Register, held that by accepting the answer the plaintiff had not given up his right to the costs, *as costs in the cause*, but had only waived his right to enforce them by means of the process of contempt. (k) It is to be

(c) This order was in conformity with a previous decision of his Lordship while Lord Keeper. *Anon.* 1 Ch. Ca. 238, *vide etiam*, Curs. Can. 226; 2 Kelynge, 5 n.

(d) Chan. Rep. Expl. paper 80.

(e) Ibid. prop. 39.

(f) 1 R. & M. 773.

(g) Anon. 1 Turn. & V. 117.

(h) Hoskins v. Lloyd, 1 S. & S. 393.

(i) Smith v. Blofield, 2 V. & B. 100.

(j) Anon. 15; Ves. 174.

(k) *Vide etiam*, Smith v. Blofield, 2 V. & B. 100.

observed that it is only as *costs in the cause* that such costs can afterwards be enforced, and that where a defendant in contempt for want of an answer had put in three insufficient answers, and pending a reference of the fourth, put in a fifth answer, which was accepted by the plaintiff, upon which a motion was made that the defendant might pay the costs of the contempt, and of the four *insufficient answers, Sir Thomas Plumer, V. C., held that he could not accede to the motion. (*l*) [*664]

With respect to what may be considered as such an acceptance of an answer as will waive a contempt, it appears that if the plaintiff takes an office copy of the answer he will be held to have accepted the answer, (*m*) unless it be an answer coupled with a demurrer, in which case the act of the plaintiff in taking an office copy will not be a waiver of the objection, as it is the only mode in which he can ascertain whether the writing is an answer or not. (*n*)

The above cases proceed upon the general principle that the taking of any step in a cause against a party in contempt is a waiver of that contempt by the party taking such step. For this purpose it has also, as we have seen, been held that replying to an answer is a waiver of a contempt, and so is the act of amending the bill (except in cases where the defendant is in actual custody, in which cases, as has been stated, amendments may be made under the 1 W. 4, c. 36, s. 15, rule 10; (*p*) or where the amendment is made, after exceptions allowed, under an order for that purpose requiring the defendant to answer the amendment and exceptions at the same time). (*q*)

An order to discharge a defendant in custody for a contempt, upon the plaintiff's amending his bill, where the amendment is not made under the 1 W. 4, c. 36, may be obtained *ex parte*, and without payment of costs. (*r*)

It is to be observed that the step taken must, in order to have the effect of a waiver of the contempt, be in the cause itself in which the contempt has been incurred; therefore, where a plaintiff was in contempt for non-payment of some costs, the filing of a cross bill by the defendant was held not to be a waiver *of the contempt by the defendant, so as to permit the plaintiff to make a motion in his own cause. (*s*) [*665]

Where any of the processes of contempt before referred to have been irregularly issued, the defendant should, by motion or petition, apply to the Court to set them aside or discharge them with costs; and we have seen that the circumstance of his being in contempt will not preclude his making such an application. (*t*)

An application of this nature should be supported by affidavits of the circumstances, (to which the plaintiff may, if he pleases, file affidavits in answer) and the Court will frequently decide the matter upon hearing the application and

(*l*) Const. v. Ebers, 1 Mad. 531. In the marginal note of this case it is said that it seems the plaintiff loses his costs. This must be incorrect, as the result of the case is merely that he cannot enforce the costs in question before the hearing, when they must be considered as costs in the cause. It is stated, however, in a recent publication upon the practice of the Court, that according to the settled practice, in the taxation of costs the costs of the contempt, even where there is a decree for the plaintiff with costs, will not be allowed him as costs in the cause. *Vide* 1 Smith, 131.

(*m*) Sidgier v. Tyte, 11 Ves, 202; Landars v. Allen, 6 Sim. 619.

(*n*) Curzon v. De la Zouch, 1 Swanst. 185.

(*p*) *Ante*, 523. (*q*) *Ante*, 528.

(*r*) Gray v. Campbell, 1 R. & M. 323; Ball v. Etches, ibid. 324.

(*s*) Gomperts v. Best, 1 Young & C. 619. (*t*) *Ante*, 656.

affidavits. (u) The regular course, however, where the Court entertains a doubt upon the subject, is to direct a reference to the Master to inquire into the regularity of the proceeding, (v) in order that the question may be formally debated upon exceptions to the Master's report, which, it appears, may be taken for the purpose of obtaining the opinion of the Court upon the propriety of the Master's decision. (w)

It seems that where a party is in actual custody, and a reference of this nature is directed, the Court has, upon his presenting a petition to that effect, permitted him in the meantime to be discharged, upon his giving security to appear and abide the order of the Court. (x)

It is to be observed that the Court will not permit the regularity of its process to be decided upon by any other tribunal, (y) and therefore in *Frowd* v. *Lawrence*, (z) where a defendant who had been taken into custody upon an attachment which was irregularly issued, obtained an order to discharge the attachment with costs, and afterwards commenced an action, against the plaintiff and the sheriff, for false imprisonment, and another action against the plaintiff for maliciously suing out the attachment, Lord Eldon, upon the authority of *Bailey* v. *Devereux*, (a) and *May* v. *Hook*, (b) made an order [*666] for an injunction to restrain the defendant from proceeding with his actions at law; his Lordship, however, held that by such an injunction the Court does not intend that the persons concerned in issuing the attachment, are not to make the party satisfaction; but only that it should not be done by an action at law, because "it is impossible, from the nature of the thing, that they can try the regularity of an attachment in a court of law;" his Lordship therefore ordered that the injunction should be without prejudice to any application that the defendant might be advised to make for compensation or the costs of law. The same principle was afterwards acted upon by Lord Lyndhurst, *ex parte Clarke*. (c)

It is to be remarked that in *Holt* v. *Holt*, (d) (where the irregularity in the process had been occasioned by one of the Registrars of the Court not entering the attachment, although he or his agent had received the usual fee for so doing,) the Court ordered the Master to tax the defendant's costs out of pocket, and directed that they should be paid by the plaintiff, who was reported to have been guilty of the irregularity, but that they should be paid over to the plaintiff by the Registrar; after this the Registrar died, and the costs having been taxed at 58*l.* the matter came on again upon petition, when the administratrix of the Registrar offered to pay the amount out of his assets, the Court being of opinion that as the Registrar had received his fee, his omitting to enter the attachment was a breach of contract and not a mere personal neglect; but as the Court would not allow such a matter to be examined by any other Court in an action, it made an order, in a summary way, for payment, by the administratrix, out of the Registrar's assets, and there being no one in Court to admit assets for her, it was ordered that she should be examined as to assets.

If a party wishes to discharge a process for irregularity, he must make his application before he complies with it, otherwise he will be considered as waiving the irregularity, (e) thus where a defendant has been taken upon process of

(u) In such cases the Court frequently applies to the Registrar, or to the Six Clerks, or clerks in Court for their opinion upon the point, and acts upon their opinion.

(v) James v. Philips, 2 P. Wms. 657; Curzon v. De la Zouch, 1 Swanst. 185.

(w) Broomhead v. Smith, 8 Ves. 357.

(x) Ibid.

(y) Holt v. Holt, 2 P. Wms. 657.

(z) 1 J. & W. 655.

(a) 1 Vern. 269.

(b) 1 Dick. 619.

(c) 1 M. & K. 563.

(d) *Ubi supra.*

(e) Anon. 3 Atk. 567; Floyd v. Nangle, 3 Atk. 569; Bound v. Wells, 3 Mad. 434; Robinson v. Nash, 1 Anst. 76.

*contempt for non-appearance, he must not enter his appearance in the ordinary way, otherwise his appearance will cure the defect. [*667]

But although a defendant, against whom an attachment has been issued for a contempt by not appearing, must not, if he means to object to the service of the *subpœna*, put in his appearance in the usual way, he must nevertheless submit himself to the jurisdiction of the Court in such a manner that, if his objection is held invalid, the plaintiff shall not be deprived of the benefit of his process; the Court therefore requires that before moving to discharge the attachment, he should *enter his appearance with the Register*, the effect of which is to enable the plaintiff, in case the Court should decide that the process has been regularly issued, to send the sergeant-at-arms at once against him without any intervening proceeding. (*f*)

It is to be observed that a subsequent appearance by a party, cannot be construed to have relation back, so as to bring him into contempt for disobeying a writ or other process issued before his waiver of the informality had made the process valid against him, and therefore where an attachment was issued against a defendant for non-appearance to a *subpœna* which had been issued against him, and in which he was described in a wrong name, it was held by the Court of Exchequer that his appearance for the purpose of discharging the attachment would not relate back so as to cure the defect in the *subpœna*, and bring him into contempt for not appearing in time. (*g*)

It should be noticed also that the principle of *waiver* applies only to an irregular and not to an erroneous order, and therefore where an order had been made that service of a *subpœna* upon the attorney should be good service, and the *subpœna* was accordingly served, upon which the attorney entered an appearance; but it was found, afterwards, that the affidavit upon which the order for substituted service had been made was insufficient, whereupon the defendant moved to set aside that order and all the subsequent proceedings, the Vice Chancellor, Sir J. Leach, made the order, on the ground that the original *order was erroneous and not irregular, and that being erroneous the defect was not cured by the subsequent appearance of the party to the *subpœna*. (*h*) [*668]

SECTION XII.

Rules to be observed under the 1 *Will.* 4, *c.* 36, *with regard to Prisoners in Custody.*

As many important alterations have been introduced into the practice with regard to prisoners in actual custody for contempts in not obeying the process of the Court by the stat. 1 W. 4, c. 36, commonly called Sir Edward Sugden's Act, it is conceived that a succinct statement of the provisions of that Act, as far as they relate to prisoners, will not be inappropriate in this place.

The first section of the Act which is applicable to this subject, is the second, by which it is enacted that the Warden of the Fleet prison shall keep a register of the names of all persons committed by Courts of Equity for contempts, stating the days and grounds of their several commitments, and the dates of the respective discharges, and shall on the twentieth days of the months of January, April, July and October in each year, make a report to the Lord

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(*f*) *Vide post*, chap. X.
(*g*) Robinson v. Nash, 1 Anst. 76.
(*h*) Levi v. Ward, 1 S. & S. 334.

Chancellor of the names and descriptions of such prisoners in his custody on each of such days respectively, with the causes and dates of their respective commitments.

The next nine sections of the Act re-enact (with some slight modifications) the clauses 5 Geo. 2, c. 25, as to taking bills *pro confesso* against defendants who abscond, &c., which the first section had repealed, and the twelfth, thirteenth and fourteenth sections re-enact the substance of the 45 Geo. 3, c. 124, which authorized the putting in appearances for defendants having privilege of Parliament, and made provision for taking *the bill *pro confesso* against them. Then follows the fifteenth section, which provides certain rules and regulations for the purpose of remedying the practice of Courts of Equity, in regard to process of contempt and the taking bills *pro confesso*, and which it is directed are to become orders and regulations of the Court of Chancery, and to be observed and enforced in and by the said Court.

[*669]

The first four of these rules relate to the shortening of the process, which is to be gone through before a plaintiff can be in a situation to take the bill *pro confesso*, and will be explained in the next chapter. The fifth rule, which more immediately relates to the subject of the present section, directs, that where a defendant under process of contempt for not appearing or not answering, is actually in jail or prison, and shall not have been sooner brought to the bar to answer his contempt, the plaintiff, if the contempt be not sooner cleared, must bring the defendant to the bar of the Court by *habeas corpus* within *thirty days* from the time of his being actually in custody, or from the time of his being charged with the contempt, (unless the last of such thirty days shall happen to be out of Term, in which case the defendant must be brought to the bar within the first four days of the ensuing Term,) otherwise the sheriff, jailer, &c. in whose custody the defendant is, must discharge him out of custody, without payment by him of the costs of the contempt, which are to be payable by the party on whose behalf the process issued.

By the same rule similar provision is made for bringing the defendant to the bar within a certain period, in cases where he has not been committed to jail, but has been taken into custody by a messenger or by the sergeant-at-arms. (*i*)

The object of introducing this rule into the Act was, as has been before observed, to remedy the evil, which was too often felt, in consequence of a plaintiff having it in his power to take a party, upon process of contempt, and lodge him in jail without there being any obligation upon the person sending him there ever afterwards to take the slightest notice of him. (*k*)

Under the above rule, therefore, the plaintiff must, if he *wishes to detain a prisoner in custody for any of the purposes for which such detainer is allowed, bring him up to the bar of the Court within the time thereby limited, or else he will lose the benefit of the process, and moreover be liable to pay all the costs which have been incurred by it.

[*670]

The Act having provided for the defendant being brought to the bar of the Court within a certain period after his arrest, next proceeds to make provision for enabling him to put in an answer to the bill without expense, in cases where he is unable from poverty to bear the expense of so doing. For this purpose, the sixth rule directs, that if a defendant upon being brought before the Court upon an *habeas corpus*, shall make oath (which shall be administered to him by the Registrar, and he is to be examined in open Court,) that he is unable, by reason of poverty, to employ a solicitor to put in his answer, the Court must, thereupon, refer it to a Master in rotation to inquire into the truth of that allegation, and to report thereon to the Court forthwith, and thereupon

(*i*) *Vide ante*, 604, 626. (*k*) Jemmett, 3.

the Court may make such order as upon other reports of the like nature under the provisions thereinafter contained; that is, the Court may assign a solicitor and counsel for putting in his answer, and defending him *in formâ pauperis*; (*m*) it may also direct that such prisoner, having previously done such acts as the Court shall direct, may be discharged out of custody. (*n*)

It is to be noticed here, although somewhat out of its place, that by the eighth rule, which will be presently referred to, the Master to whom the case of any prisoner is referred by the Court, is empowered to examine the prisoner, and all other persons whom he may think proper to examine, upon oath, which he is thereby authorized to administer, and he may also cause any officer, clerks or ministers of any Courts of Law or Equity, to bring and produce before him, upon oath, any records, orders, books, papers or other writings, belonging to the said Courts, or to any of the officers within the same, as such officers.

*It is also to be observed that by the 14th rule, it is provided that where a defendant is in custody for a contempt in not appearing, [*671] and shall be able to put in his answer by borrowing or obtaining a copy of the bill, without taking an office copy of the bill, he shall not be compellable to take any such copy, but the clerk in Court may (if he think the defendant is of sufficient ability to pay for an office copy,) require him to make an affidavit denying his ability in consequence of poverty, to pay for an office copy of the bill.

It seems, that under an order made in pursuance of the sixth rule, the defendant ought to bring in before the Master a statement of his inability to employ a solicitor, supported by affidavit, and in a late case where the Master to whom such a reference had been made certified "that he had been attended by the plaintiff's solicitor, and had caused notice to be given to the defendant, requiring her to bring in such statement, but that the defendant had not brought in any, nor had any person appeared on her behalf, and that he was therefore unable to ascertain whether she was or was not unable by reason of her poverty, to employ a solicitor to put in her answer," the Vice Chancellor ordered that a writ of *habeas corpus cum causis* should issue, on the authority of rule 2, directed to the Warden of the Fleet, commanding him, at the return of the writ, to bring the defendant to the bar of the Court to answer her contempt, and that the clerk in Court for the plaintiff should then attend with the record of the bill, in order that the same might be decreed to be taken *pro confesso* against her. (*o*)

It is to be remarked that the Master, in the above case, proceeded *ex parte*, on its appearing upon the affidavit of the plaintiff's solicitor, that he had served the defendant with a copy of the warrant to proceed before the Master, and that he as well as another solicitor had explained to her what was required by the Master, and the course she ought to pursue, but that the defendant had positively declared that she would not file any *answer to the bill or carry any state of facts into the Master's office. In *Atkinson* v. [*672] *Flint*, (*p*) however, where, under similar circumstances, the Master reported that he had made the inquiry in the presence of the plaintiff's solicitor, no person attending on the defendant's behalf, although she had been personally summoned, and that on reading an affidavit on plaintiff's behalf, he did not find

(*m*) Jemmett, 67 *k*.

(*n*) Ibid. It is to be observed that the above section applies only to those cases in which a defendant is brought up on *habeas corpus*. It is a subject of doubt, therefore, whether it can take effect where the prisoner is brought up either by a messenger or by the sergeant-at-arms: and whether, in such cases, it may not be necessary to send the defendant to the Fleet, and then to bring him before the Court by means of a *habeas corpus*.

(*o*) Williams v. Parkinson, 5 Sim. 74. (*p*) 5 Sim. 77.

that the defendant was unable, by reason of her poverty, to employ a solicitor, the Vice Chancellor referred it back to the Master to review his report, and ordered that the Warden of the Fleet should produce the defendant before the Master at such time and place as the Master should appoint, and that the inquiry should be proceeded with in her presence.

The Act having, by the preceding rules, obliged a plaintiff to bring a defendant to the bar within a certain period after his arrest, and provided against the defendant being detained in custody, where the only reason for his non-compliance with the rules of the Court is his poverty, by furnishing him with the means of putting in his answer, and of defraying the costs of his contempt, goes on to prevent the possibility of any prisoner being suffered in future to remain in neglected imprisonment by directing in the seventh rule, that on the 30th days of the months of January, April, July and October, in every year, (or if any of those days should happen on a Sunday, then on the following day,) one of the Masters of the Court of Chancery, to be named by the Court, shall visit the Fleet prison, and examine the prisoners confined there for contempt, and shall report his opinion on their respective cases to the Court; and that thereupon it shall be lawful for the Court to order, if it shall see fit, that the costs of the contempt of any such prisoner shall be paid out of the interest and dividends arising from the several Government or Parliamentary securities, standing in the name of the Accountant General of the said Court of Chancery, to the account, intituled, "*Account of the Moneys placed out for the benefit and better security of the Suitors of the High Court of Chancery*," and "*Account of Securities purchased with Surplus Interest arising from Securities, *carried to an account of Moneys placed out for the benefit and better security of the Suitors of the High Court of Chancery*," [*673] or out of any cash standing to either of such accounts, or to any other account which is now or hereafter may be standing to the credit of the suitors of the said Court of Chancery (after and subject to the payment of all charges which by any Act heretofore passed are directed to be paid thereout) and to *assign a solicitor and counsel to such prisoner*, for putting in his answer and defending him *in formâ pauperis*, and to direct any such prisoner, having previously done such acts as the Court shall direct, to be discharged out of custody; provided that if any such defendant become entitled to any funds out of such cause, the same shall be applied, under the direction of the said Court, in the first instance to the reimbursement of the suitor's fund.

It is to be observed, that applications to the Court under this rule must be made to the Lord Chancellor.

It is also to be observed, that the seventh rule is entirely framed for the relief of defendants, and that the Lord Chancellor has no authority to make an order under that rule on the application of the plaintiff. The course is, that the Master shall visit and make his report, and the Court is then authorized to direct payment of the costs of the contempt out of the suitors' fund, and on the contempt being cleared, the defendant is entitled to apply for his discharge. (*q*)

The provisions of the eighth rule, as to the examination of the prisoner and other persons upon oath, and the production of records, order books, papers and writings belonging to any other Court, applies as well to cases where the Master shall visit the Fleet, under the last mentioned rule, as to those which are specially referred to him. And, by the ninth rule, it is provided, that when it shall appear to the satisfaction of the Court that any prisoner is an idiot, lunatic, or of unsound mind, the Court shall appoint a guardian to put in his answer, and discharge the defendant, providing for the costs in any of the ways

(*q*) Watkin v. Parker, 1 M. & Craig, 370.

pointed out by the Act as shall seem just; and that if the Court shall see fit, the defence may be made *in formâ pauperis.*

*The above rules provide against the possibility of a defendant being detained in custody in consequence of his not being able, [*674] by reason of poverty, or of insanity or imbecility of mind, to put in his answer in the ordinary way. But it frequently happens, that a defendant is obstinate, and refuses either to appear or to put in his answer, although he has not the excuse of poverty or want of intellect to justify his refusal. In such cases the Act furnishes the plaintiff with the means of obtaining justice, by authorizing him to enter an appearance for the defendant, or to put in an answer for him, or by proceeding to take the bill *pro confesso* against him. The mode in which these objects are to be accomplished under the Act, will be pointed out in the next Chapter.

The statute, however, does not permit the plaintiff to sleep upon his rights, or to detain a defendant in custody for an unlimited time, without availing himself of the powers which it confers; and accordingly, the 13th rule provides, "that where the defendant is in contempt *for not appearing*, or *not answering*, and in actual custody under process for such contempt, or being already in custody, shall be detained by an attachment for such contempt, and shall not, where the contempt is for not appearing, enter an appearance within twenty-one days after he is lodged in jail or prison, or the attachment is lodged against him, (he being already in prison, as the case may be) or, where the contempt is for not answering, put in an answer within two calendar months after he is lodged in jail or prison, or the attachment is lodged against him, (he being already in prison,) the plaintiff shall within fourteen days after the period, computed from the expiration of such twenty-one days, within which he may by the provisions of the Act be able to enter such appearance, cause an appearance to be entered for the defendant under the powers thereby given, and shall, at the expiration of such two calendar months proceed to take the bill *pro confesso*, and shall accordingly obtain an order for taking the same *pro confesso* within six weeks after the period, computed from the expiration of such two calendar months, within which he may be able to take the same *pro confesso.*" The rule then directs that in default of the plaintiff doing in either of the above cases as the Act directs, the defendant *shall, upon application to the Court, be entitled to be discharged out of custody without paying [*675] any of the costs of the contempt, unless the Court shall, under the power thereinbefore contained, see good cause to remand and detain the defendant in custody. (r)

Under this section, therefore, where a defendant is in custody for a contempt in *not appearing*, if the plaintiff, (after allowing the defendant twenty-one days from the time of his being in actual custody for such contempt, or from the process being lodged against him in prison, to enter an appearance for himself,) does not within fourteen days after the expiration of such twenty-one days, enter an appearance for him under the 11th section, the defendant will be entitled to his discharge, without paying his costs, upon application to the Court, unless the Court shall see good cause to remand and detain him in custody. (s)

(r) The power referred to in the latter part of the above Section is that given by the 12th rule, by which it is provided, that in any case, where upon the application of the plaintiff, the Court shall be satisfied that justice cannot be done to the plaintiff without an answer to the bill, or to the interrogatories from the defendant himself, it shall be lawful for the Court to order the defendant to remain in custody until answer or further order, without prejudice to the plaintiff's availing himself of any of the provisions of the Act.

(s) If, after an appearance has been entered in the manner above pointed out, the defendant omits to clear his contempt or to put in his answer, the plaintiff must, after the defend-

Where the defendant is in custody for not *answering*, the plaintiff must, in order to prevent a defendant from being entitled to his discharge without payment of costs, proceed to take the bill *pro confesso* against him, and actually obtain an order for that purpose within six weeks after the expiration of two calendar months from the time of his being first taken to the jail or prison, or from the time of the attachment being lodged against him there; which two calendar months are allowed to the defendant by the Act for the purpose of enabling him either to put in his answer, or in case of his poverty and inability to do so, to make application to the Court for relief, under the rules before pointed out.

[*676] *It is to be observed, that the 13th rule directs that the prisoner shall, in the cases therein mentioned, be discharged *upon his making an application;* this direction is important, because it may happen that the period, within which a plaintiff is bound, under that section, either to enter an appearance for the defendant, or to procure an order to take the bill *pro confesso* against him, may arrive at a time when the Court is not sitting, in which case, were it not for the necessity imposed upon him of applying to the Court, the defendant might be discharged before the plaintiff could have had an opportunity of complying with the conditions of the rule; thus, for instance, the twenty-one days, which a defendant has for entering his appearance from the time of his first commitment, or the two calendar months, from the same period, which he is entitled to have for putting in his answer, may expire at the commencement of the long vacation, in which case, according to the rule, the time within which the plaintiff must cause an appearance to be entered for him, or obtain the order for taking the bill *pro confesso*, would expire before sitting of the Court would re-commence: the consequence of this would be, if the defendant were to be entitled to his immediate discharge, as he is under the 5th rule, without further application, the plaintiff would lose all the benefit of his process; but as the 13th rule requires the defendant who is entitled to his discharge under its provisions, to apply to the Court for the purpose of obtaining it, he must wait till the sittings are resumed, so that the plaintiff will have an opportunity, by using due diligence, to do that which the rule requires him to do, viz: either get the appearance entered, or obtain the order for taking the bill *pro confesso*, before the defendant's application can be made.

It is right also to observe, that by the 12th rule it is provided, that when, upon the application of the plaintiff, the Court shall be satisfied that justice cannot be done to the plaintiff without an answer to the bill or to the interrogatories from the defendant himself, it shall be lawful to the Court to order the defendant to remain in custody till answer or further order, but without prejudice to the plaintiff's availing himself of any of the provisions of the Act.

[*677] *The above sections and rules were intended to provide effectually against a defendant's being detained in custody for a contempt in not answering, or not appearing in consequence of the *laches* or negligence of the plaintiff. The Act also makes provision for the performance of its orders and decrees by prisoners in custody for contempt incurred by their disobedience to them (which will be noticed when we come to consider the method of enforcing the orders and decrees of the Court,) and then proceeds to direct (*t*) that in any other case of a commitment for contempt, not therein specially provided for, the Court may, upon any application of the prisoner, or of any other person in the cause or matter, or upon any report to be made in pursuance of the Act, make

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ant's time for answering has expired, take measures to have the bill taken *pro confesso* against him in the manner pointed out in the ensuing chapter, for taking bills *pro confesso* against defendants in contempt for want of an answer. *Vide post*, 689.

(*t*) Rule 17.

such order for the discharge of the prisoner upon any such terms, and making, if the Court shall see fit, any costs in the cause as to the Court shall seem proper; and by the 18th rule, it is further directed, that where any person committed for a contempt shall be entitled to his discharge upon applying to the Court, but shall omit to make such application, the Court may, upon any such report as aforesaid (*i. e.* upon the report of the Visiting Master under the 7th rule,) compulsorily discharge such person from the contempt, and from such custody, and pay the costs out of any funds belonging to him over which the Court may have power, or make them costs in the cause as against him, or may discharge him from the contempt, but leave him in custody for the costs, which may be cleared, if he be insolvent, under the provision thereinafter contained in that behalf.

The provisions made by the above Act for clearing the costs of a contempt under the Insolvent Debtor's Act, (*u*) are comprised in the 17th section, by which it is enacted, that where the process of contempt is for the non-performance of an act, (viz: for not answering the plaintiff's bill,) and the bill in equity, to which the insolvent is a party, is taken *pro confesso*, and he has not paid the costs of the contempt, or the insolvent has fully answered the plaintiff's bill, or interrogatories, or otherwise cleared his contempt, except as far as regards *the payment of his costs, or it has become in the event unnecessary for him to do the act for which he was committed or [*678] attached, the Court of Equity in which the suit is depending, shall, upon the application of the party in contempt, discharge him from the same, except as to the costs thereof, for which he shall remain in custody; and such costs shall be deemed within the provisions lastly thereinbefore contained, (*x*) and he shall be dischargeable therefrom, and from the process of contempt, in like manner as if the process of contempt were for non-payment of money or costs. It is provided, however, that this order or regulation shall not weaken any of the other powers by the Act given, and that nothing therein contained shall lessen the operation of the Act for the relief of insolvent debtors.

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*CHAPTER IX. [*679]

OF TAKING BILLS PRO CONFESSO.

SECT. I.—*Origin and Nature of the Practice.*

IN the preceding Chapter the reader's attention has been drawn to the method which the Court adopts to compel a refractory defendant to obey the writ of *subpœna* which has issued against him. By means of the process there pointed

(*u*) 7 Geo. 4, c. 57.

(*x*) By the preceding Section, XVI. it is enacted, "That where a person shall be committed for a contempt in not delivering to any person or persons, or depositing in Court or elsewhere, as by any order may be directed, books, papers or any other articles or things, any sequestrator or sequestrators, appointed under any commission of sequestration, shall have the same power to seize and take such books, &c., being in the custody or power of the person against whom the sequestration issues, as they would have over his own property, and thereupon such articles or things so seized and taken shall be dealt with by the Court as shall be just; and after such seizure it shall be lawful for the Court, upon the application of the prisoner, or of any other person in the cause or matter, or upon any report made in pursuance of this Act, to make such order for the discharge of the prisoner upon such terms, and if it shall see fit, making any costs in the cause, as to the Court shall seem proper."

out, the plaintiff may, if the defendant be not a privileged person, take his body as a security for his obedience, or if he be a privileged person, or manages to keep out of the way so successfully as to avoid an arrest, he may proceed to compel his submission by taking from him the enjoyment of his property and effects till he complies with the requisitions of the writ.

It is obvious, however, that in a Court of Equity, where the nature of the relief to be granted frequently depends upon the discovery to be elicited from a defendant by his answer, the mere taking a party into custody or sequestrating his property, cannot answer the object of doing that justice to the plaintiff, which it is the business of Equity to secure. The Court has, therefore, adopted a method of rendering its process effectual, by treating the defendant's contumacy as an admission of the plaintiff's case; it will, therefore, in cases where the whole line of process has been ineffectually employed against the defendant, make an order that the facts of the bill shall be considered as true, and decree against the defendant according to the equity arising upon the case stated by the plaintiff. This proceeding is termed, taking a bill *pro confesso*.

It seems that this practice is not of very ancient standing, and that the custom formerly was, to put the plaintiff to make *proof of the substance [*680] of his bill, but there is no doubt that the course of taking the bill *pro confesso* is now the established practice of the Court whenever it is necessary to have the decree of the Court against a defendant "who has allowed all the process of the Court to be issued against him without putting in his answer. (a)

SECTION II.

Where the Defendant is not in Custody.

As considerable difference exists in the practice of taking a bill *pro confesso* in cases where the defendant is not in custody, and in those where he is, the reader's attention will be called to the method of proceeding in each case separately; and we shall now proceed to consider the case of a defendant not in custody.

It is to be observed, that, till a very recent period, the practice of taking bills *pro confesso* was confined to cases where the defendant had appeared to the *subpœna*, but had permitted process of contempt for want of his answer to run on to sequestration, and that it was not till the 5 Geo. 2, c. 25 (b) was passed, that the process of the Court could be made effectual against persons who had not entered their appearance. By that Act, provision was first made for ordering a bill to be taken *pro confesso* and a decree to be made, against persons who absconded, or went out of the realm to avoid being served with the process of the Court. The provisions of that Act, as far as they relate to this proceeding, have all, as we have seen, been repealed and re-enacted by the 1 Will. 4, c. 36, s. 3, 5, 6, 7, 8, and the course of proceeding to obtain an order to take a bill *pro confesso* under them has been already pointed out. (c) It is important, however, that it should be fixed in the mind of the practitioner that [*681] the *operation of the above mentioned Act is confined to cases where the defendant is either gone abroad or absconds to avoid being served,

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(a) Hawkins v. Crook, 2 P. Wms. 557.
(a) Johnson v. Desminere, 1 Vern. 223; Gibson v. Scevington, 1 Vern. 247.
(b) Repealed and re-enacted by 1 Will. 4, c. 36.
(c) *Ante*, p. 270.

either with the *subpœna* or any of the subsequent process, and that it cannot be acted upon, unless upon positive affidavit that the party has been in England within two years next before the issuing of the *subpœna*. (*d*)

The defect of power in the Court to supply the means of making its process effectual against parties resident out of its jurisdiction, has, in suits of a particular description, been remedied as to persons resident in any parts of the United Kingdom which are out of the jurisdiction of the Court, by the 2 W. 4, c. 33, and the powers of that Act have, as we have seen, been enlarged and extended by the 4 & 5 W. 4, c. 82, to persons resident out of the United Kingdom; so that in cases which come within the meaning of those Acts, means are afforded of proceeding to take the bill *pro confesso* against such persons. (*e*)

According to the old practice of the Court a plaintiff intending to take a bill *pro confesso* against a defendant who had appeared, but who was in contempt for want of an answer, was obliged, before he could do so, to go through the whole line of process before pointed out. If upon the attachment the sheriff returned *non est inventus*, such return was followed by an *attachment with proclamations, commission of* *rebellion, *sergeant-at-arms, and sequestration.* These proceedings were attended by considerable [*682] expense and delay; and, however necessary all the caution, which this long series of proceedings implies, might have been considered in the infancy of Courts of Equity, in order to soften down the objections to the Courts themselves, it was thought by the commissioners appointed in 1824 to inquire into the practice of the Court, that it was not requisite, at a period when the jurisdiction was fully established, to encumber the suitor with the delay and expense occasioned by the various steps enumerated; (*f*) they therefore recommended that in order to shorten the process to be gone through for taking a bill *pro confesso*, where the defendant is in contempt for want of an answer, and the sheriff returns *non est inventus* to the attachment, the plaintiff should be at liberty to pass by the intermediate process of contempt, and to move at once for a sergeant-at-arms; provided, however, that no order for a sergeant-at-arms should be made unless the motion should be supported by an affidavit of the solicitor of the plaintiff, or of his town agent, (if the writ of attachment was issued by such town agent) that due diligence has been used for the purpose of ascertaining where the defendant was to be found at the time of issuing the writ, and that he verily believes that the defendant was then to be found in the county into which it did actually issue, and that due diligence had been used for the service of the process by the officer employed for that purpose. (*g*)

(*d*) *Vide ante*, 274. In addition to what has been already said upon the subject of taking bills *pro confesso*, against a party absconding, the reader's attention may be here called to the case of Knowles v. Broome, 1 V. & B. 306, in which, where it was impossible to comply with the directions of the Act, (which requires that a copy of the order for the defendant to appear by a certain day, should, besides being posted up at the Royal Exchange, and inserted in the London Gazette, be published in the parish church of the parish where the defendant last resided, immediately after divine service,) in consequence of the church being under repair, the Court, upon application, after the repairs had been completed (on the authority of Wilkinson v. Coker, 1 Dick. 74,) allowed the time mentioned in the order for the defendant's appearance to be enlarged, and ordered the defendant to appear within that time. In Bragg v. ——, Sir J. Leach, V. C. held, that where the defendant's last place of residence was Gray's Inn, which was extraparochial, the publication of the order in the chapel of that society was within the statute. In Ch. July, 1830, MS.

(*e*) In Harrison v. Hinde, in Ch. 6th June, 1836, an order was made for taking a bill *pro confesso* against a defendant resident in Demerara, against whom an appearance had been entered under the provisions of the 4 & 5 W. 4, c. 8. Reg. Lib. 1836, A. fol. 764.

(*f*) Chanc. Rep. expl. paper, 69. (*g*) Chanc. Rep. 39; Prop. 6.

This proposition has been embodied in the first rule of the 1 W. 4, c. 36, s. 15, before referred to; (*h*) and according to that rule a plaintiff, if the other requisites required by it can be complied with, may, in proceeding to take a bill *pro confesso*, omit all the intermediate process between the attachment and the sergeant-at-arms. Where, however, the provision of that rule cannot be complied with, the plaintiff must still proceed through the whole line of process, according to the old practice. (*i*)

In either case, however, it is necessary, unless in the case of persons having [*683] privilege of Parliament, that the sergeant-at-arms *should go, because, except in those cases, the sergeant-at-arms is the only officer upon whose return a sequestration can issue. (*j*)

Upon the sergeant-at-arms making a return of *non est inventus* an order for a sequestration issues, upon the application of the plaintiff, in the manner before pointed out; (*k*) and it is upon this order or upon the issuing of the writ, and not upon its execution, that the order for taking the bill *pro confesso* will be made. (*l*)

It is to be observed, however, that the execution of the sequestration affords no ground for refusing the order; and that after goods or real estate have been seized, the plaintiff may still proceed till he has got the bill taken *pro confesso*. (*m*)

As the order for taking a bill *pro confesso* is made upon the ground of the defendant not having answered the bill, a doubt appears to have been entertained by Lord King, whether after an answer has been put in, but reported to be insufficient upon exceptions, such a proceeding could be taken; and in *Hawkins* v. *Crooke*, (*n*) his Lordship held that it could not. In that case the defendant had appeared, and had stood out all the process to a sequestration, whereupon the plaintiff obtained an order to set down the cause, to the intent that the bill might be taken *pro confesso*, but the defendant after getting the hearing postponed put in an answer, which was reported insufficient, whereupon the plaintiff served him with a *subpœna* to put in a better answer. The further answer was also reported insufficient, and then on Saturday the defendant put in a third answer; and on the Monday following the cause came on, upon the order for taking the bill *pro confesso*, when the defendant moved for further time, but the Master of the Rolls decreed for the plaintiff. The matter, however, was afterwards brought before Lord King upon appeal, when his Lordship reversed the decree made upon taking the bill *pro confesso*, observing that he could not reconcile it to reason or common sense, that a defendant should be said to con- [*684] fess the whole bill *to be true, when it appeared by the Master's report, (which was a record of the same Court) that he had answered the greatest part of it, and when the plaintiff himself had taken the first answer to be an answer in part, by serving the defendant with process to put in a better. In a subsequent case, also, Lord King appeared to be strongly inclined to the opinion that after an insufficient answer the bill might be taken *pro confesso*, *quoad* the particulars not answered; (*o*) but in *Davis* v. *Davis*, (*p*) Lord Hardwicke set the question at rest, by deciding that after an insufficient answer the whole bill may be taken *pro confesso* His Lordship, who was

(*h*) *Ante*. 605.
(*i*) *Ante*, 605, 607.
(*j*) *Ante*, p. 630.
(*k*) *Ante*, p. 631.
(*l*) For cases in which it will be proper to carry the sequestration into execution where it is intended to take the bill *pro confesso*. *Vide Ante*, p. 631.
(*m*) Davis v. Davis, 2 Atk. 22.
(*n*) 2 P. Wms. 556; 2 Eq. Ca. Ab. 178.
(*o*) Abergavenny v. Abergavenny, 4 Vin. Ab. 446, pl. 1; 2 Eq. Ca. Ab. 179; Sel. Ca. in Ch.
(*p*) 2 Atk. 22, 24.

counsel in *Hawkins* v. *Crooke*, said that the bar were not satisfied with the reasoning of that case. He also said that, in Equity, the taking a bill *pro confesso* was analogous to taking a declaration to be true at law where a plea or answer of a defendant is insufficient, and that it is equally just to do so.

There is therefore no longer any doubt, that after an insufficient answer, (which is in practice always considered as no answer) the whole bill may be taken *pro confesso*, in the same manner that it is, where no answer at all is put in. And so also where a husband and wife were defendants, and the husband put in an answer without his wife joining in it, (there being no order to warrant such a proceeding) the Court treated the answer as a nullity, and made the order for taking the bill *pro confesso*. (*p*) It has likewise been held that where, after a full answer, a bill has been amended, and the amended bill is not answered, the plaintiff is entitled to an order to take the bill *pro confesso generally*; (*q*) and where an order was made for the clerk in Court to attend with the record of bill, in order to have it taken, *pro confesso as to the amendments only*, Lord Apsley discharged the order, being of opinion that the original and amended bills were one record, and that the amendments not being answered, the record was not answered.

In order to obtain a decree *pro confesso* against a defendant who has stood out all the process of contempt to a sequestration, a previous order should be procured, directing the cause *to be set down, and the plaintiff's clerk in Court to attend at the hearing with the record of the plaintiff's bill, in order to have the same taken *pro confesso* against such defendant. This order, (which is termed "the order for taking the bill *pro confesso*") is obtained on motion or petition, and it is said that, in order to obtain it, the certificate of a sequestration having issued, and that the defendant still stands out in contempt, signed by the Six Clerk, must be produced. (*r*) The plaintiff should then, if the defendant in contempt is the only defendant, have the cause set down for hearing by the Court as a short cause for the last day of causes in term, or at the Rolls on the second day after. (*s*) If, however, he omit to do this, and the cause is set down in the general paper, he may, it seems, on application to the Court, have it advanced to the head of the paper on a specific day. (*t*) If there are other defendants, who will not consent to the cause being advanced, it must keep its place in the general paper, and come on in its turn.

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According to the old practice of the Court, where a Peer, a member of the House of Commons, or other privileged person, has appeared and is in contempt to a sequestration for want of an answer, and the order for the sequestration has been made absolute, the bill may be taken *pro confesso* against him, by the same process that is used in the case of an ordinary person; and by the 1 W. 4, c. 36, sect. 13, after reciting that in many cases it is necessary, on the part of the persons having legal rights against persons having privilege of Parliament, to proceed by bill in equity against such persons so having privilege of Parliament, to obtain from them discovery, on oath, of facts intended to be used or given in evidence in courts of law, against the persons making such discovery; and that in cases where such persons having such privilege as aforesaid shall stand out process of contempt, parties entitled to such discovery against

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(*p*) Bilton V. Bennett, 4 Sim. 17. *Ante*, p. 209.

(*q*) Jopling v. Stuart, 4 Ves. 619.

(*r*) 1 T. & V. 130. The practice of the Register's Office appears, however, to be, to draw up the order on the production of the *order* for the sequestration only.

(*s*) Hand. 41, n.

(*t*) Hart v. Ashton, 1 Mad. 175; *vide etiam*, Turner v. Turner, 4 Sim. 497; Baker v. Keen, ib. 498. In this respect the practice in taking bills *pro confesso* against a defendant who is not in custody differs from the course of proceeding where he is. *Vide post*, sect. 3.

[*686] them have not sufficient means of compelling or *obtaining the same in all cases, it is therefore enacted, that from and after the passing of the Act, when any defendant having privilege of Parliament shall have appeared to any bill filed against him, seeking a discovery, upon oath, or when an appearance shall have been entered for such defendant according to the provisions aforesaid, and such person shall refuse or neglect to put in his answer to such bill within the time for that purpose allowed by the rules and orders of such Court, that then it shall and may be lawful for the plaintiff in such suit to apply to the Court for an order that such bill should be taken *pro confesso* against such defendant, and upon such application such Court of Equity shall make an order that such bill shall be taken *pro confesso*, unless the defendant shall, within eight days after being served with such order, shew good cause to the contrary.

"And it is further enacted, that when and so *soon as* any such order shall have been pronounced by any such Court of Equity for taking such bill *pro confesso*, such bill in Equity, or an examined copy thereof so taken *pro confesso*, shall be taken and read in any Court of Law or Equity, as evidence of the facts and matters and things therein contained, in the same manner as if such facts, matters and things had been admitted to be true by the answer of the defendant put in to such bill; and such bill so taken *pro confesso* shall be received and taken in evidence of such and the same facts, and on behalf of such and so many persons, as the answer of the defendant to the said bill could and might have been read and received in evidence of, in case such answer had been put in by the defendant thereto and had admitted the same facts, matters and circumstances, as in such bill stated and set forth; and in like manner *every other bill of discovery* taken *pro confesso* under any of the provisions of the Act, shall or may be taken and read in evidence of the facts and matters and things therein contained, to the extent aforesaid."

The above sections have been substituted for the 4th and 5th sections of the 45 Geo. 3, c. 124, which they repeal; the only difference being in the latter part of the last quoted section, which extends the power of reading bills taken *pro confesso* under its provision as evidence to all bills taken *pro confesso* under that Act.

[*687] *It is to be observed that in *Jones* v. *Davis*, (*u*) upon an application being made to Lord Eldon, that a bill, not a mere bill of discovery, but which prayed relief, might be taken *pro confesso*, under the 5th section of the 45th Geo. 3, c. 124, (of which the 13th section of the 1 W. 4, c. 36, is a precise copy) his Lordship held that that section applied only to bills of discovery, and refused the motion; but in *Logan* v. *Grant*, (*x*) Sir Thomas Plumer, V. C. upon the above case being cited to him on a similar application, said that he thought there must be some misapprehension of what the Lord Chancellor had said, and that it could not govern the practice, there being no reason why the construction of the Act should confine the relief given by it to bills of discovery only.

For the practice with regard to the taking a bill *pro confesso* against the King's Attorney General in cases in which he omits to answer, the reader is referred to a former part of this treatise. (*y*)

A bill may be taken *pro confesso* against a corporation aggregate upon the issue of a sequestration, in the same way that is done in the case of an individual. (*z*)

(*u*) 17 Ves. 368.
(*y*) *Ante*, 183.
(*x*) 1 Mad. 626.
(*z*) *Vide ante*, 190.

SECTION III.

Where the Defendant is in Custody.

We now come to the consideration of the course to be pursued in order to take a bill *pro confesso* against a defendant who is in actual custody, either for contempt in not appearing or in not answering.

With respect to persons who are in custody for a contempt in not appearing, the stat. 1 W. 4, c, 36, s. 11, confers upon the Court, as we have before seen, a power, in case a defendant upon being brought up by *habeas corpus* shall refuse or neglect to enter his apprearance, or (being within the walls of any prison in England, under or charged with an attachment or *other [*688] process of contempt, shall, after fourteen days' notice in writing requiring him to enter an appearance, refuse or neglect to enter his appearance, or to appoint a clerk in Court to act in his behalf,) to appoint a clerk in Court to enter an appearance for such defendant, and it directs that such proceedings may be had thereupon as if the party had actually appeared. So that where a party is in actual custody, an appearance may be obtained from him either by bringing him up to the bar of the Court, or by serving him in the prison where he is, with the notice required by the Act. By this means he is placed in the same situation as a defendant who has appeared and has been taken upon process of contempt for not answering, and the same method may be pursued for getting the bill taken *pro confesso* against him as against such defendant.

It is to be observed, however, that if the plaintiff intends to take a bill *pro confesso* against a defendant who is in custody for not appearing, he must, under the 13th rule, allow him twenty-one days from the time of his being lodged in jail or prison, or from the attachment being lodged against him, he being already in prison, before he enters an appearance for him under the above section. He must likewise take care that the appearance is entered for him within fourteen days after the expiration of the twenty-one days within which he may put in his answer, otherwise he will be entitled to be discharged, upon his application to the Court, under the same rule, unless the Court shall see good cause to remand him. Therefore where the plaintiff does not intend to bring the defendant to the bar of the Court, but to enter an appearance for him, upon notice, in the manner authorized by the 11th section, he should so contrive the notice, that the fourteen days shall expire within fourteen days after the expiration of the twenty-one days; and if the defendant has not been brought to the bar at all, the fourteen days' notice in writing, to be served upon him in prison, must also expire within the time limited by the 5th rule for a defendant who is actually in prison being brought to the bar, otherwise the defendant will be entitled to apply for his discharge under the operation of that rule.

After an appearance has been entered for a defendant under *the [*689] provisions of the above Act, the plaintiff may, (if the defendant remains in custody, and does not put in an answer within the time limited for that purpose by the orders of the Court,) issue an attachment against him for his contempt in not answering, and charge him with that contempt, by lodging the attachment with the Warden of the Fleet; he may then proceed to have the bill taken *pro confesso* against him, in the manner directed by the second rule, which will be presently detailed. (*a*)

(*a*) It is to be observed, that in order to entitle a plaintiff to take this course he must wait till the defendant's time for answering has expired before he can proceed; this, according to the practice of the Court at the time when the 1 W. 4, c. 36, was passed, was *eight days*

According to the old practice of the Court, where a defendant was in custody for a contempt in not obeying the *subpœna*, the first step was, if he was in the hands of the messenger or of the sergeant-at-arms, to have him brought to the bar of the Court by the officer. If he was in actual prison, he was brought up by *habeas corpus*, and upon his being so brought up he was committed (or if brought up from thence remanded) to the Fleet prison. (*b*)

The defendant being thus in custody of the Warden of the Fleet charged with his contempt, the next step was to bring him up again to the bar by the ordinary *habeas corpus* of the Court; upon which occasion the Court admonished him of his contempt, and interrogated him as to the cause of his refusal, and it usually assigned him a day to answer. He was then remanded to the Fleet, and if he persisted in his contempt he was again brought into Court upon an *alias habeas corpus*; then by a *pluries habeas corpus*, being at such several times, upon his continuing contumacious, remanded to the Fleet. If after being brought up and remanded upon a *pluries habeas corpus*, he still continued contumacious, he was then brought up for the last time upon an *alias pluries* [*690] *habeas corpus*, whereupon an order would be made for taking the bill *pro *confesso* against him, the Court having previously, if he had not appeared, ordered that an appearance should be entered for him, pursuant to the statute 5 Geo. 2, c. 25. (*c*)

In order to obviate the delay and expense of this protracted process, the Commissioners for inquiring into the Practice of the Court recommended that it should be considerably shortened; in pursuance of which it has been enacted, by the 1 W. 4, c. 36, s. 15, rule 2, "that if any defendant being in contempt for not answering the bill, shall have been brought to the bar of the Court under process for such contempt and shall have been committed or remanded back to the prison of the Fleet, the plaintiff may sue forth the writ of *habeas corpus*, in the manner and form heretofore in use in the like cases, *provided that there shall be at least twenty-eight days between the day on which such defendant was so committed or remanded back and the return of such writ of habeas corpus*; and upon the return of such writ of *habeas corpus*, *in case such defendant shall not have put in his answer*, the Court shall order the bill to be taken *pro confesso* against such defendant, in the same manner as is now usual in the like cases upon the return of a writ of *alias pluries habeas corpus*, and such decree shall thereupon be made as shall be thought just."

By the fourth rule of the same section, it is also enacted, "that where a defendant is confined for a misdemeanor, and has been brought before the Court upon an *habeas corpus*, and thereupon has been turned over to the Fleet *pro formâ*, but has been carried back to the prison from whence he came with his cause, another writ of *habeas corpus* may issue, directed to the jailer or keeper of the prison to which he has been carried back, and thereupon the defendant shall be brought into Court and remanded to the prison from whence he came, with his cause, without being turned over again to the Fleet prison, and the bill may be taken *pro confesso*, in the same manner in all respects as if the defendant had been all along in the custody of the Warden of the Fleet."

This rule was, as we have seen, (*d*) introduced for the purpose of rendering the process of the Court for compelling an answer as affective against prisoners

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after appearance, but by the new orders of the 21 December, 1833, ord. x. the time for the defendant's putting in his answer has been extended to eight weeks in a town cause, and ten weeks in a country cause; the effect of which has been, very considerably, to protract the period within which the plaintiff can proceed to take the bill *pro confesso*, and consequently the time of the defendant's imprisonment.

(*b*) Hind. 110. (*c*) Hind. 110.

(*d*) *Ante*, p. 595.

in custody for misdemeanors as *against other persons. Nothing, however, is said in the rule as to the time which must elapse between the period of his being committed to the Fleet *pro formâ* upon the first *habeas corpus*, and the return of the second; but, it is presumed, that it must be the same as that prescribed in the second rule, where a defendant has been committed or remanded to the Fleet. [*691]

Under these rules, therefore, coupled with the other rules and sections of the Act, the course of proceeding in order to take a bill *pro confesso* against defendant in custody for not putting in an answer, is—

1. *Where he is in custody of the messenger or sergeant-at-arms*, to cause him to be brought to the bar of the Court within the time limited by the fifth rule, when, unless the Court shall see fit to order his discharge, as coming under any of the rules before pointed out, he will be committed to the Fleet prison until he answers and clears his contempt.

2. *Where he is already in jail for a midemeanor*, he must be brought up to the bar of the Court, by *habeas corpus cum causis*, within thirty days from the attachment being lodged against him (unless such thirty days shall expire in vacation, in which case he must be brought to the bar within the first four days of the ensuing term) when the Court will make an order that he shall be committed to the Fleet, *pro formâ*, and then carried back to the prison from whence he came, *cum causis*.

3. *Where he is in the Sheriff's prison, or in the Fleet*, having been lodged there in pursuance of process of contempt for not answering, or, being already there, has been charged with such process, he must be brought up to the bar by *habeas corpus* within the time specified in the fifth rule before referred to, and upon being so brought up he will be committed or remanded to the Fleet prison till he puts in his answer and clears his contempt.

From this statement, it appears that *in no case will the statute apply till the defendant has been brought to the bar of the Court, and committed or remanded to the Fleet prison, charged with the contempt;* and in *Bilton* v. *Bennett*, (*e*) *where a defendant in contempt, for want of a joint answer by himself and his wife, being in the custody of the warden of the Fleet for contempt in another cause, was brought up at once by *habeas corpus* for the purpose of having the bill taken *pro confesso* against him, without having been brought up by a previous *habeas corpus*, and remanded till he answered the bill, the Vice Chancellor ruled that the bill could not then be taken *pro confesso*, but that he must be remanded to the Fleet and brought up again by another *habeas corpus*, returnable in twenty-eight days from such remanding. (*f*) [*692]

The prisoner being thus brought to the bar of the Court, and committed or remanded to the Fleet, charged with his contempt, must remain in prison for at least twenty-eight days (which are to be allowed him from such his committal or remanding to put in his answer;) he may then be again brought to the bar for the purpose of having an order made for taking the bill *pro confesso* against him.

This is to be done by means of the writ of *habeas corpus*, mentioned in the second rule above referred to, but in case the defendant is in custody for a misdemeanor, the second writ of *habeas corpus*, mentioned in the fourth rule, must be resorted to.

(*e*) 4 Sim. 17.

(*f*) It is to be observed, that in the above case the husband had put in an answer for himself, in which his wife did not join; but, inasmuch as it was done without an order to sanction it, the Court treated it as a nullity. *Vide ante*, p. 209.

In suing out this writ of *habeas corpus*, two things are to be attended to with respect to the return, viz: first, to have it fixed at such a time, that the defendant may have at least twenty-eight days (from the time of his committal, or being remanded) to put in his answer before he is again brought up; and, secondly, that such twenty-eight days shall not expire before two calendar months have elapsed from the time of the defendant's being first committed to jail upon the process, or, if he was already in prison, of the process being lodged against him there; for, it is to be observed, that by the thirteenth rule the plaintiff cannot proceed to take the bill *pro confesso* till after the expiration [*693] of two calendar months from the time of his being first committed to prison under *the process of contempt, or from the process being lodged against him, he being already in prison.

It is also to be observed, that the same rule provides that the plaintiff shall, at the expiration of such two calendar months, proceed to take the bill *pro confesso*, and shall actually obtain an order for that purpose within six weeks after the expiration of the two calendar months, and that in default of his so doing the defendant may apply to the Court for his discharge. So that, besides the two points before mentioned as necessary to be observed in respect of the return of the *habeas corpus*, under which the defendant is to be brought up, there is this third point to be attended to; namely, to have it fixed so that it shall fall within the six weeks, to be computed from the end of the two calendar months from the period of the defendant's being committed to prison or the attachment being lodged against him. (*g*)

The defendant being brought up under the writ of *habeas corpus* above mentioned, the Court will, if he still persists in his refusal to put in an answer, make an order for taking the bill *pro confesso* against him; and, it is to be observed, that in such cases the plaintiff may, if the defendant or defendants in custody be the only defendants, have the bill taken *pro confesso*, and obtain a decree (upon the application of counsel) at the return of the *habeas corpus*, without the process of setting down the cause. (*h*) In such cases it must form part of the order by which the defendant is remanded upon the first *habeas corpus*, that the clerk in Court should, at the return of the next *habeas corpus*, attend in Court with the record. If there be other defendants, the cause must be set down, (*i*) which must also be done in all cases where the defendant is not in custody, whether the order has been made upon the issuing of a sequestration, (*k*) or under the statute, against a defendant who has absconded to avoid process. (*l*)

[*694] It may be noticed in this place, that where a plaintiff, after *a defendant has been taken into custody upon a contempt for want of an answer, is desirous of amending his bill, he may do so without prejudicing his right to take the bill *pro confesso*, under the tenth rule of the Act, 1 Will. 4, c. 36, s. 15.

As it not unfrequently happens that in the case of a defendant standing in the situation of a trustee having no beneficial interest in the subject-matter, a mere formal answer would fulfil all the purposes of taking the bill *pro confesso*, the Act provides a method of putting in such answer in cases where the defendant is a mere formal party, by directing, that in every case where the defendant has been brought to the bar of the Court to answer his contempt for not answer-

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(*g*) The course of proceeding when the time within which a plaintiff ought to obtain the order for taking the bill *pro confesso* expires during the vacation, does not very clearly appear.

(*h*) Seagrave v. Edwards, 3 Ves. 372; Lewis v. Marsh, 2 S. & S. 220.

(*i*) Ibid. 1 Newland, 95; *sed vide* 1 Smith, Ch. P. 113.

(*k*) *Ante*, 685. (*l*) *Ante*, p. 276.

ing, and shall refuse or neglect to answer within the next twenty-one days, the plaintiff shall be at liberty, with the leave of the Court, (upon ten days' previous notice to the defendant after the expiration of such twenty-one days, unless good cause be shown to the contrary,) instead of proceeding to have the bill taken *pro confesso*, to put in such an answer to the bill as thereinafter is mentioned, in the name of the defendant, *without oath or signature*, and thereupon the suit shall proceed in the same manner as if such answer were really the answer of the defendant, with which the plaintiff was satisfied; and the costs of the contempt, and of putting in such answer, may be provided for in like manner as if the defendant himself had put in such answer; and such answer, besides the formal parts thereof, shall be to the following effect: "that the defendant leaves the plaintiff to make such proofs of the several matters in the bill alleged as he shall be able or be advised, and submits his interest to the Court." (*m*)

It is also enacted by the twelfth rule of the above Act, "That in any case where, upon the application of the plaintiff, the Court shall be satisfied that justice cannot be done to the plaintiff without an answer to the bill, or to the interrogatories from the defendant himself, it shall be *lawful for the Court to order the defendant to remain in custody until answer or further order*, but without prejudice to the plaintiff availing himself of any of the provisions of this Act."

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*SECTION IV. [*695]

Proceedings subsequent to Order.

The course to be pursued to obtain a decree against the defendant, after the order for taking the bill *pro confesso* has been pronounced, has been before pointed out. (*n*) It remains only to be observed, that after the order has been made, the mere putting in an answer by the defendant will not be a sufficient ground for moving to set the order aside; and where upon that ground a motion was made to discharge an order for taking a bill *pro confesso*, it was refused with costs. (*o*)

If, however, the plaintiff receives the costs, or accepts the answer, (by taking a copy of it or otherwise,) or takes exceptions to it, he will waive the process; the reason of which is, that he cannot, after an answer is actually filed, have a decree *pro confesso* without, in the first instance, moving to take the answer off the file, which he cannot do after any of the above mentioned acts. (*p*)

But although the mere gratuitously putting in an answer will not be sufficient to discharge the order for taking a bill *pro confesso*, yet wherever an order of this nature has been made, and the defendant comes in upon any reasonable ground of indulgence, and pays the costs, the Court will attend to his application unless the delay has been extravagantly long. (*q*) It is not, however, a matter of course to discharge the order for taking the bill *pro confesso*, and the Court, before doing so, will require to see the answer proposed to be put in, in order that it may form a judgment as to the propriety of it, and will not put the plaintiff to the peril of having just such an answer as the defendant shall think proper to give. (*r*)

(*m*) Sect. 15, rule 11.
(*n*) *Ante*, pp. 685, 693.
(*o*) Williams v. Thompson, 2 Bro. C. C. 280; 1 Cox 413, S. C.
(*p*) Sidgier v. Tyte, 11 Ves. 202.
(*q*) Williams v. Thompson, *Ubi supra*.
(*r*) Hearne v. Ogilvie, 11 Ves. 77.

When a bill is to be taken *pro confesso*, either at the hearing or upon motion, the plaintiff's clerk in Court must attend with the record of the bill, and then, if upon reading the record, and taking it to be true, the plaintiff appears to have [*696] *any equity against the defendant, the Court will decree accordingly. And it is to be observed, that where a bill is to be taken *pro confesso*, the Court hears the pleadings, and itself pronounces the decree, and does not permit the plaintiff to draw up the decree, (as it does in ordinary cases when the defendant makes default at the hearing:) (*s*) and where upon hearing the case it appeared that the plaintiff had no equity, the bill was dismissed. (*t*)

It is to be observed, that a decree made upon taking a bill *pro confesso* against a person absconding to avoid being served with process, under the 1 W. 4, c. 36, sect. 3, is in effect only a decree *nisi*, the Act allowing the defendant or his representatives to come in and answer the bill, provided they do so within seven years, before which time the decree cannot be made absolute. (*u*)

In all other cases a decree made upon taking a bill *pro confesso* is absolute in the first instance, and no day is given for showing cause against it. (*x*) Like any other decree of the Court, it cannot be impeached collaterally, but only upon a bill of review, or to set it aside for fraud; and therefore where a bill was filed for an account of matters which were embraced in a former bill filed some years before, which had been taken *pro confesso* for want of answer, and the defendant insisted upon the decree in the former suit in bar to the new one, the new bill was dismissed with costs. (*y*)

In *Knight* v. *Young*, (*z*) however, where an attempt was made on the part of a defendant, by motion, to get rid of a decree taken *pro confesso* upon a sequestration, and to put in an answer, on the defendant's own affidavit that he had been deranged, Lord Eldon, although he refused the application, appeared to think that a case might occur in which such a proceeding would be allowed, upon the ground of imbecility of mind, when the fact was established by other [*697] evidence than that of the defendant himself; and in *Bolton* *v. *Glassford* (*a*) his Lordship, although he did not go the length of admitting the party to set aside the decree generally, as if the cause had never been before the Court for hearing, gave relief to the party by limiting the effect of the decree. It appears, however, from the statement of the case in *Knight* v. *Young*, that previously to doing this his Lordship had satisfied himself, by the affidavits and documents in the cause, that the defendants, although they held out a long time, did not mean that the cause should be heard *pro confesso*, and that an answer had in fact been prepared, stating the circumstance upon which they relied, the truth of which was established by many other documents. (*b*)

It seems that a cause in which a decree has been made upon taking a bill *pro confesso* may be reheard; and where a bill had been taken *pro confesso*

(*s*) Geary v. Sheridan, 8 Ves. 192.
(*t*) Molesworth v. Lord Verney, 2 Dick. 667.
(*u*) *Vide ante*, p. 272.
(*x*) Landon v. Ready, 1 S. & S. 44.
(*y*) Ogilvie v. Hearne, 13 Ves. 563.
(*z*) 2 V. & B. 184.
(*a*) 2 V. & B. 186, cited.
(*b*) It is stated in a note to Knight v. Young, *ubi supra*, that the case of Bolton v. Glassford would be reported in the 18th volume of Mr. Vesey's Reports; but no such report, however, occurs. The order in the Registrar's book, however, is as follows: "His Lordship doth declare that the decree is not to be considered as affecting the defendant to the extent of the admission of assets, so far as he can make out to the satisfaction of the Master that there was a debt due to the Crown, in respect of which debt, and to the extent of which, the Master is to be at liberty to give him the benefit, as if there was no admission of assets. Reg. Lib. 1811, A. 1654. (b)

against a husband and wife, and afterwards the husband died, the Court allowed the cause to be reheard on the petition of the wife. (c)

It has been before stated that when a bill has been taken *pro confesso* against a defendant abroad, who has absconded to avoid process, the defendant, or his representatives, (if he is dead,) may, within six months after being served with a copy of the decree, (which the Act directs to be served upon the defendant or his representative on his coming within the jurisdiction, or dying within seven years,) appear and petition to have the cause reheard. He or his representative may also, without being served, make a similar application by petition any time within the seven years; but if he omit to do so within the seven years this decree will stand absolutely confirmed. (d)

It is to be observed, that by the 4th section of the Act, it is provided that if any person against whom any decree *shall be made, upon refusal or neglect to enter his appearance, or to appoint a clerk in Court or [*698] attorney to act on his behalf, shall be in custody or forthcoming, so that he may be served with a copy of such decree, then he shall be served with a copy thereof before any process shall be taken out to compel the performance thereof.

In all other cases where a decree has been made by taking the bill *pro confesso* the proceedings under it are the same as the proceedings under every other decree made upon a hearing. If the decree directs a reference to the Master, the reference must be proceeded with in the Master's office, in the same way as any other reference. It is however to be observed, that according to the old practice of the Court, where the decree directed the Master to take an account, a bill taken *pro confesso* could not be read before the Master as evidence of the state of the account; and that where, under a decree, which directed the Master to take an account of all dealings and other transactions between the plaintiff and the defendant, and that the parties should be examined upon interrogatories, &c., the plaintiff offered, by way of evidence in support of his charge, a schedule annexed to his bill, (which had been taken *pro confesso*,) in which he had set out the account between him and the defendant, the Master required the plaintiff to prove his charge in the usual way, which the plaintiff not doing, the Master made his report that nothing was due. The plaintiff took exceptions to the report; but Lord Thurlow, after taking time to inquire into the practice, over-ruled the exceptions, and put this case: "Suppose the defendant had answered, and the plaintiff had not replied to the answer, must not the plaintiff have proved his charge?" (e)

This must still be the rule of practice in all those cases in which the bill has been taken *pro confesso* in the ordinary course, *i. e.* upon a sequestration against a defendant who is not in custody, and who has not absconded to avoid the process; but there appears to be some doubt whether bills taken *pro confesso*, under the 1 W. 4, c. 36, against a defendant in *custody, or who has absconded, may not be read in evidence, as well before the [*699] Master as elsewhere.

It will be seen, upon reference to the fourteenth section, which has been before set out, (f) (and which is in fact a copy of the sixth section of the 45 G. 3, c. 124, which the Act of the 1 W. 4, c. 36, repeals) that as soon as such an order as therein mentioned (that is to say, the order authorized by the preceding section to take a bill *pro confesso*, which seeks a discovery upon oath against a defendant having privilege of Parliament) shall have been pronounced for taking such bill *pro confesso*, such bill so taken *pro confesso*, or an examined copy

(c) Tooke v. Clarke, 1 Dick. 350. As to taking bills *pro confesso* in cases of husband and wife, *vide ante*, p. 214.

(d) *Vide ante*, p. 272.

(e) Dominicetti v. Latti, 2 Dick. 588.

(f) *Ante*, 686.

thereof, shall be read in any Court of law or equity, as evidence of the facts, matters and things therein contained, &c. It then goes on to enact, *that in like manner every other bill of discovery taken pro confesso under any of the provisions of the Act shall or may be read in evidence of the facts and matters, and things therein contained:* (g) so that a question arises whether, under this clause, bills requiring a discovery on oath from other persons than those having privilege of Parliament, can, after they have been taken *pro confesso*, be read as evidence against such persons?

With respect to the application of this Act to render all bills taken *pro confesso* under its provisions (whether bills for discovery only or bills for discovery and relief) evidence against persons having privilege of Parliament, there can, after the decision of Sir Thomas Plumer in *Logan* v. *Grant*, (h) upon the construction of the 45 Geo. 3, c. 124, s. 5, which has been before referred to, be little doubt: whether it can be extended, under the additional words above mentioned, to render bills taken *pro confesso* against persons not having privilege of Parliament, evidence against such persons, or if it can, whether such extension will be confined to bills of discovery only (which are the bills specifically pointed out in that part of the section) are points which have not yet been decided. In the absence of authority, therefore, upon these points, all that the [*700] writer can do is to call the reader's attention *to them, and to express his individual opinion to be, that with respect to bills which are merely filed for a discovery, without praying relief, there can be little doubt that the words before alluded to will, where they have been taken *pro confesso* under the Act, render them available as evidence against the plaintiffs, although they be not persons having the privilege of Parliament; and that there seems to be no reason why the doctrine of Sir Thomas Plumer in *Logan* v. *Grant* should not apply to the case of bills filed by unprivileged persons, as well as to those which are exhibited on behalf of members of Parliament.

(g) The words in italics were not in the 45 Geo. 3, c. 124, s. 5.
(h) 1 Mad. 626, *ante*, 687.

END OF VOL. I.

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